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# Class Actions and Duplicative Litigation

EDWARD F. SHERMAN\*

Legal innovations, like social and political movements, are often the result of some compelling human ideal, and the development of the modern class action arises from the lofty hope that group wrongs can be resolved in a single case. Thus a principal objective of the class action is to avoid having members of the class file individual suits, or, to use the term by which that phenomena has come to be known, to avoid duplicative litigation.<sup>1</sup> By trying a group of similar cases together in a single suit, the class action promises to prevent the unnecessary waste of judicial resources and the possibility of inconsistent judgments.

Duplicative litigation is a constant problem in the class action context, but there is a peculiar lack of agreement as to both the availability of legal devices to avoid it and the policy considerations at stake. The principal coercive device for avoiding duplicative litigation is an injunction against the parties from proceeding with a suit in another court. There are also other methods for reducing the effects of duplicative litigation—such as a court's staying its own proceedings so that another court can proceed with a related case,<sup>2</sup> consoli-

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1. Duplicative litigation is the simultaneous prosecution of two or more suits in which some of the parties or issues are so closely related that the judgment of one may have a res judicata effect on the other. See Note, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977). The terms "parallel" or "concurrent" litigation are sometimes used to describe the same situation. The term "duplicative" has a more pejorative connotation, suggesting duplication of effort and the possibility of inconsistent results, and is used in this Article because those concerns are central to the proper functioning of the class action.

Three types of duplicative litigation have been identified: (1) multiple suits on the same claim by the same plaintiff against the same defendant ("repetitive" suits), (2) a separate suit filed by a defendant to the first action, seeking a declaratory judgment that he is not liable under the conditions of the first action or asserting an affirmative claim that arises out of the same transaction or occurrence as the subject matter of the first action ("reactive" suits), and (3) separate actions by class members on the same claims raised in a class action, either seeking to represent the same or a similar class or raising their own individual claims. See MARCUS & SHERMAN, *COMPLEX LITIGATION* 148-49 (1985); Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961); Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960). This Article deals primarily with the third category and especially with "break-away" claims of class members.

2. The federal courts' power to stay proceedings before them is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The decision to stay "calls for the exercise of judgment which must

dation,<sup>3</sup> multi-district panel transfer,<sup>4</sup> and application of claim and issue preclusion<sup>5</sup>—but these presuppose the concurrent pendency of duplicative suits and only seek to reduce the effects of unnecessary duplication. The various devices for preventing duplicative litigation are related in function, but because they derive from different historical and textual sources, they are not generally considered as parts of a coherent doctrine.

Predicting how duplicative litigation will be handled in a particular class action can be a chancy affair. Uncertainty as to the significance to be

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weigh competing interests and maintain an even balance." *Id.* at 254-55. Among the factors to be considered are comity, promotion of judicial efficiency, adequacy and extent of relief available in the alternative forum, likelihood of prompt disposition in the alternative forum, identity of the parties and of the issues in both actions, convenience of the parties, counsel and witnesses, and possible prejudice to a party as a result of the stay. *Corinthian Pool Corp. v. National Northeast Corp.*, 492 F. Supp. 928, 929-30 (D.N.H. 1980). See also *Balfour v. Gutstein*, 547 F. Supp. 147, 148 (E.D. Pa. 1982). State courts, applying similar criteria, may choose to stay in deference to a federal court, particularly if the federal action is first in time or has superior ability to resolve the dispute. A stayed action is not dismissed and may be resumed upon the completion of the other action, although collateral estoppel may effectively prevent the relitigation of the same issues. See generally Note, *Staying Diversity Proceedings Pending the Outcome of Parallel Suits in State Court*, 48 Mo. L. Rev. 1017 (1983); Note, *Parallel State and Federal Court Class Actions*, 12 Loy. U. Chi. L.J. 277 (1981).

3. See FED. R. Civ. P. 42(a) ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."). Consolidation is only available when the actions are pending in the same division of the same federal district court. However, related cases may be transferred to a more convenient forum in the same federal district and consolidated there. See 28 U.S.C. § 1404(a) ("For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

4. 28 U.S.C. § 1407(a), enacted in 1968 after an ad hoc attempt to coordinate discovery for thousands of cases in different federal courts arising out of the electrical equipment price-fixing conspiracy, provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceeding." The Judicial Panel on Multidistrict Litigation, consisting of seven circuit and district court judges, orders the transfers. Upon completion of pretrial proceedings, each action shall be remanded to the district in which it originated, "unless it shall have been previously terminated . . ." But see Note, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588, 607-08 (1972) ("transferee courts have usually attempted to decide all substantive issues in the litigation"). Efficient resolution has been said to subsume the other criteria for MDL treatment. See Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 681 (1984).

5. See George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980); Note, *Class Action Judgments and Mutuality of Estoppel*, 43 GEO. WASH. L. REV. 814 (1975). Concerning the res judicata effects of a class action judgment on class members, see, e.g., *Cooper v. Federal Reserve Bank of Richmond*, 104 S. Ct. 2794 (1984) (members' individual claims of discrimination not foreclosed by judgment against class in suit alleging general pattern of employment discrimination); *In re Transocean Tender Offer Sec. Litig.*, 427 F. Supp. 1211 (N.D. Ill. 1977) (non-opting-out class members bound by judgment in state court class action challenging tender offer). See generally JAMES & HAZARD, CIVIL PROCEDURE § 11.28, at 640-42 (1985).

accorded to the existence of a class action lies in part in the vagaries of our multi-sovereign judicial system. We have no certain mechanism for insuring that only one court will contemplate class action treatment or that only one class will be certified. Jurisdictional limitations, the concerns of federalism (when state and federal courts are involved), and the clash of sovereign powers (when different state courts are involved) can pose insurmountable barriers to the creation of the "perfect class action." Furthermore, a court that certifies a class often lacks the information and monitoring capacity to insure that its class action is the best way to resolve the matter.

These problems, however, should not obscure the fact that the class action is perhaps the most efficient device available for avoidance of multiple litigation.<sup>6</sup> This Article proposes that the availability of a class action should be a significant factor for triggering anti-duplicative litigation devices, particularly an injunction to insure unitary disposition of the matter. A federal court class action possesses additional advantages not available in state courts in regard to nationwide and regional class actions which may justify deference in appropriate cases. Considerations of efficiency and fairness, which underlie the function of the Rule 23 class action, should provide the primary touchstones for determining whether duplicative litigation is to be permitted in the face of a federal class action. When the duplicative litigation is in state courts, a federal class action court is also constrained by the federalism concerns reflected in the Anti-Injunction Act. However, a functional analysis of the exceptions to the Act better serves both the ends of federalism and the purposes of the class action than the rigid historical analysis often pursued in the past.

In considering when unitary disposition of a class action matter is appropriate, this Article urges that the interrelationship between the decision to certify a class and the decision to enjoin other litigation be appreciated by courts. In appropriate cases, the possibility of hybrid forms of class actions that limit opt-out rights when critical to achieving the efficiencies of the class action may be a means of reconciling a mandatory class action with the comity and federalism concerns of other courts. The various devices

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6. The purpose of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). "Predictions of 200,000 to 400,000 asbestos cases filed nationwide by the end of this century suggest that certification of a class of pending cases would not be 'the be-all and end-all' reduction of the docket. Shakespeare, *Macbeth* I, 6. Certification could, however, dispense with a number of burdens on the present docket 'at one fell swoop.' *Id.* at IV, 3." *Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 271 (E.D. Tex. 1985). See generally Garth, Nagel & Plager, *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, 48 LAW & CONTEMP. PROBS. 137 (Summer 1985); Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980).

available for avoiding duplicative litigation should be viewed as pieces of a whole in determining both class certification and later resort to coercive devices to prevent duplicative litigation.

## I. AVOIDANCE OF DUPLICATE LITIGATION AS A FACTOR IN DETERMINING CLASS CERTIFICATION

Before turning to the coercive injunctive device for preventing duplicative litigation it is useful to consider the relevance of duplicative litigation to the decision whether to certify a class action. The benefits offered by class actions—such as economy of party and judicial resources, prevention of inconsistent verdicts, and increased economic viability of small suits through sharing of attorneys' fees and litigation resources—are threatened by duplicative suits. Therefore, a calculation of the likelihood and effect of duplicative litigation is an essential part of the class certification process.

The definitions of all three types of class actions reflect the advantages of avoiding duplicative suits. In a (b)(1) class, it is the threatened impact of "other litigation," when contrasted to that of a class action, that makes class treatment desirable. The prosecution of separate actions creates a risk of establishing incompatible standards of conduct for the party opposing the class (a (b)(1)(A), or "incompatible standards," class) or of impairing the ability of class members not parties to protect their interests (a (b)(1)(B), or "limited fund," class).<sup>7</sup> In a (b)(2) class, it is the desirability of classwide injunctive relief, rather than piecemeal and possibly conflicting remedies in individual suits, that justifies class treatment.<sup>8</sup>

The threat of duplicative litigation is central to the certification decision in (b)(1) and (2) situations, and that concern is answered by the rules' failure to provide a right to opt out. The rules do not require that notice be given to class members and do not extend a right to be excluded. Thus, unless the judge exercises discretion to exclude, class members are saddled with having their claims resolved by the class action.<sup>9</sup> Because of the absence of an opt-out right, (b)(1) and (2) class actions are referred to as "mandatory." Their "mandatory" character derives from the practice in equity courts of preserving unitary jurisdiction over certain matters by forbidding litigation on the same matter in other courts.<sup>10</sup> Thus the certification decision is closely

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7. FED. R. CIV. P. 23(b)(1). The advisory committee's notes observed that a plaintiff's ability to protect its interests is impaired when numerous claims are asserted "against a fund insufficient to satisfy all claims." Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 101 advisory committee's note (1966).

8. FED. R. CIV. P. 23(b)(2).

9. See Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 11 (1983).

10. See *infra* text accompanying notes 53, 138-40.

bound up with the imposition of coercive devices to prevent duplicative litigation, as will be discussed in detail in section II.<sup>11</sup>

In a (b)(3) class, the threat of duplicative litigation is not as central to the certification decision. Class treatment is appropriate if questions of law or fact common to the class members predominate and a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."<sup>12</sup> In a (b)(3) class there is no assumption that other duplicative litigation will be avoided. Indeed, class members must be given a right to opt out, suggesting that they might pursue their own claims in other suits.<sup>13</sup> Nevertheless, duplicative litigation may undermine the utility of a (b)(3) class action, and thus the rule requires, through the "superiority" analysis, a comparison between class and non-class treatment before certification can be made. The court must "forecast the procedural steps necessary to implementing the class action remedy, then consider the alternatives and make a comparison judgment evaluating the options."<sup>14</sup> That can be quite an order since there are often uncertainties and contingencies that hinder confident prediction.

The threat of duplicative litigation bears on the court's forecast in different ways. Insofar as existing individual suits indicate that the class members have adequate, non-class remedies available, multiple suits may actually offer a salutary vehicle for avoiding the cumbersomeness of a class action. However, insofar as existing individual suits (and the possibility of future suits) can result in duplication of effort, dilution of class effectiveness, and inconsistent judgments, they demonstrate the superiority of class treatment. In order to forecast which effect multiple suits will have, the court must assess what remedies are available (under both the class and non-class alternatives) for limiting the disruptive and wasteful effects of multiple litigation in order to achieve the most efficient and just resolution for the members. To accomplish this, the rule lists four nonexclusive factors, focusing heavily on efficiency and economy, for determining the superiority of class treatment in (b)(3) class actions.<sup>15</sup>

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11. See *infra* text accompanying notes 52-224.

12. FED. R. CIV. P. 23(b)(3).

13. FED. R. CIV. P. 23(c)(2) ("In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.").

14. 3B J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 23.45[3], at 23-337-38 (2d ed. 1985).

15. FED. R. CIV. P. 23(b)(3)(A)-(D).

### A. Interest of Class Members in Separate Litigation

The first factor is "the interest of members of the class in individually controlling the prosecution or defense of separate actions."<sup>16</sup> This suggests that despite the undesirable features of duplicative litigation, the preference of individual class members for it weighs in favor of denying class treatment. A number of courts, however, have held that mere individual preference for individual actions should not outweigh demonstrated benefits of class treatment in terms of economy and fairness.<sup>17</sup> Even if, for example, all five thousand class members in a particular suit preferred individual suits (itself an unlikely event), a court should not be obligated to allow them if the total benefits of class treatment outweigh the disadvantages.

This factor also should not be read as protecting a defendant's "divide and conquer" strategy. Whatever the attractiveness to defendants of forcing individual suits by class members, a defendant has no entitlement to individual litigation. In *O'Meara v. United States*,<sup>18</sup> for example, the court rejected the defense's claim that the existence of forty individual suits by class members demonstrated that a class action was not superior. It gave no weight to the defendant's intention "to litigate each individual case which is filed seeking to obtain a favorable determination and, at the same time, hoping that few of the potential claimants will even file suit." According to the court, "[t]he only way to bring the issue to a definitive conclusion, one way or the other, is by a class action which will bind all concerned."<sup>19</sup>

The desire of individual class members to control their own suits carries little weight in class actions involving small amounts of money.<sup>20</sup> An argument could be made that, without a class action, there might be no duplicative litigation because the class members would not have the incentive, nor could they afford, to bring individual suits. This argument, however, must be rejected because otherwise the special utility of the class action for providing a remedy for claims that do not warrant individual suits would be lost.<sup>21</sup>

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16. FED. R. CIV. P. 23(b)(3)(A).

17. See 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1780, at 564 (2d ed. 1986).

18. 59 F.R.D. 560 (N.D. Ill. 1973).

19. *Id.* at 567.

20. However, in a defendants' class action, the desire of the members to control their own cases should perhaps be given greater weight in deciding whether to certify because they are not in the suit voluntarily and may not have the right to opt out given to (b)(3) class plaintiffs. See C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, vol. 7A, § 1780, at 565-66. Compare *Henson v. East Lincoln Township*, 55 U.S.L.W. 2513 (7th Cir. Mar. 11, 1987) (defendant (b)(2) mandatory class not permissible) with *Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984) (upholding defendant (b)(2) class).

21. C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, vol. 7A, at 565-66 n.6.

There *are* situations in which individual members' interests in controlling their own suits may go beyond mere preference to justify denial of class certification. For example, a number of pending individual suits could raise doubts about the quality of the class representation (tending to show a lack of "representativeness")<sup>22</sup> or as to whether the issues are really common to the class (tending to show a lack of "commonality")<sup>23</sup>. There may, however, be ways to deal with this concern without denying class treatment—such as replacing or expanding the class representatives or subclassing.<sup>24</sup>

There is one particular situation in which members' preference for individual suits can undermine the economy and efficiency benefits of a class action and thus constitute grounds for not certifying a class. If most class members will opt out, a (b)(3) class certification may not reduce duplicative litigation; instead, it could constitute just one more suit which, because of the cumbersomeness of class action procedure, may demand a disproportionate amount of time and expense.<sup>25</sup> But this situation is rare, and threats of massive opt-outs do not always materialize. A court has broad powers to shape a class to make it attractive to the members and to insure that they are notified of the benefits of class treatment. And decertification is always a remedy if massive opt-outs render the class action an empty shell.<sup>26</sup>

### B. *Extent and Nature of Other Litigation*

The second factor relating to the issue of the superiority of a (b)(3) class is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class."<sup>27</sup> This focuses directly on the risk of duplicative litigation, requiring the court to identify what litigation already has been filed and to assess its impact on the ability of the class action to achieve its expected benefits. Unlike the first factor, which accords some value to class members' preference for individual suits, the second factor reflects the assumption that duplicative litigation is undesirable. The question here is whether, given that other suits have already been filed, the class action can better avoid the disadvantages of duplicative litigation.

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22. FED. R. CIV. P. 23(a)(3).

23. FED. R. CIV. P. 23(a)(2).

24. See *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1471-98 (1976). See generally Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492 (1982).

25. The ultimate certification of a (b)(3) class in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), after a mandatory (b)(2) class certification was held improper, comes to mind. There a large number of class members with local attorneys opposed the class with a Washington, D.C. firm as class counsel, and most opted out. See generally *infra* text accompanying notes 144-57.

26. FED. R. CIV. P. 23(b)(3)(B).

27. *Id.*



It is not to be assumed that multiple litigation will always have the undesirable aspects of duplicative litigation, or that a class action will, in fact, be able to prevent duplicative litigation better than existing suits. "If the court finds that several other actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be enjoined, which is not always feasible, a Rule 23 proceeding only might create one more action."<sup>28</sup> Thus the court must analyze the procedures available under both the existing litigation and the proposed class action for preventing duplicative litigation (as by stay or injunction) and for avoiding the adverse effects of multiple suits (as by consolidation, transfer, or test case selection).

The nature of the other pending litigation is an important consideration. If it is another class action, there is less reason to give deference to the new class action request. In a clash between two class actions, neither is trump, and the issue becomes whether particular features of the proposed class action offer benefits which the existing action lacks. Whether the pending litigation and the proposed class action are in federal or state courts is also an important factor because a mixed federal-state court situation raises federalism concerns affecting injunctive powers.<sup>29</sup> In contrast, when both are in courts of the same state, or in federal courts, pragmatic considerations—such as priority in time, extent to which the first court has expended judicial effort on the suit, convenience of the forum, definition of the class in each case, and completeness of the remedy sought—will be determinative.<sup>30</sup>

When the existing litigation is an individual suit, the proposed class action may offer distinctive advantages in avoiding duplicative litigation. These advantages depend in part on the class definition and scope of the remedy sought; if they are too narrow, duplicative litigation may not be precluded anyway. The advantages will also depend upon the likelihood that the class action will prevent other litigation. This is not always the case. The opt-out right in a (b)(3) class, for example, may well open the door to a multiplicity of suits. However, even if a class action is in no better position than the existing case to use coercive means to prevent duplicative litigation, it may still offer an incentive for class members to forego individual suits which can be assessed in the particular case.

These are the sorts of considerations that a court must weigh in judging the significance of existing litigation. And although the rule does not specifically mention future litigation, the "superiority" of a class action would certainly be affected by whether it is likely to prevent future duplicative litigation.

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28. C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, vol. 7A, § 1780, at 569-70.

29. See *infra* text accompanying notes 109-43.

30. See *infra* text accompanying notes 57-108.

Because coercive means of preventing duplicative litigation may not be available in (b)(3) classes,<sup>31</sup> an important question can be whether the simultaneous processing of a class action and individual suits is compatible and would likely result in some efficiencies. In *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*,<sup>32</sup> seventy-four individual patent infringement suits were pending against eighty electronic manufacturers in nineteen different federal courts when a class action was filed. The court certified the class although the pending suits would continue. It found that the individual cases would not be delayed or made more burdensome if the class action were maintained. It was thus a case of "half a loaf is better than none." "The action taken here," the court said, "offers promise of preventing further simultaneous involvement in active litigation in other states," and "the prospect of a fair and efficient disposition of this litigation offers many rewards to the plaintiffs and members of the class and all subclasses thereof."<sup>33</sup>

In *re Arthur Treacher's Franchise Litigation*<sup>34</sup> reflects a different assessment of the compatibility of a class action with existing suits. There the plaintiff, a franchisor corporation, sought to certify a defendant class of franchisees who were withholding payment of royalties. The court refused to find that a class action was the superior method of proceeding, noting that pending suits by the franchisees against the corporation had been consolidated for pretrial purposes by the Multidistrict Litigation Panel. It found that significant progress had been made in those suits, and class certification would hamper that progress. Thus nothing was to be gained by allowing the class action and pending suits to proceed together, while harm to the pending suits might be done.

### C. Desirability of Concentrating Litigation in the Forum

The last two factors focus primarily on practical considerations that could prevent the class action from achieving its objectives. The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum."<sup>35</sup> This raises considerations similar to those governing dismissal or a change of venue on the ground of *forum non conveniens*.<sup>36</sup> Its concern is on whether the forum offers procedures that will reduce the duplication of resources and inconsistent results of duplicative litigation. The court will have to determine not only whether it is a convenient forum in terms of accessibility of witnesses and evidence, but also whether

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31. See *infra* text accompanying notes 246-64.

32. 285 F. Supp. 714 (N.D. Ill. 1968).

33. *Id.* at 724.

34. 93 F.R.D. 590 (E.D. Pa. 1982).

35. FED. R. CIV. P. 23(b)(3)(C).

36. C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, vol. 7A, § 1780, at 573.

it is suited to handling a class action that will, in fact, avoid duplication of effort. Often it is the forum in which the majority of suits have already been brought that offers the best opportunity for concentrating suits. If that forum is a federal court, transfer within the same district, multidistrict transfer, or consolidation are vehicles for concentration that are not usually available in state courts.<sup>37</sup> Thus when suits are pending in different states, a federal class action can offer distinct benefits.

### *D. Difficulties in Management*

The fourth "superiority" factor looks to "the difficulties likely to be encountered in the management of a class action."<sup>38</sup> The range of considerations is extensive, such as the size and compatibility of the class, problems of identifying class members, ease of notice, likelihood of intervention, and administrative burdens on the court. In the case of duplicative litigation, this factor should prompt a court to ask whether a class action is so unwieldy as to offer no economies over multiple suits.

A class action should not be found unmanageable without exploring the procedural devices available for bringing it in line. These include subclassing and trial of subclass issues separately,<sup>39</sup> bifurcating liability and damages,<sup>40</sup> using a fluid recovery,<sup>41</sup> devising an objective formula for determining individual damages,<sup>42</sup> issuing orders under Rule 23(d) to "prevent undue repetition or complication in the presentation of evidence or argument,"<sup>43</sup> appointing a special master for difficult evidentiary matters,<sup>44</sup> use of litigation committees or surrogates to receive claims and proof of eligibility for

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37. See *supra* notes 3-4.

38. FED. R. CIV. P. 23(b)(3)(D).

39. See *Dierks v. Thompson*, 414 F.2d 453 (1st Cir. 1969). See also *Developments in the Law—Class Actions*, *supra* note 24, at 1479-82.

40. See *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970); *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). See also *Transgrud, Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 826-30 (1985).

41. See *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252 (7th Cir. 1984); *Bebchick v. Public Utils. Comm'n*, 318 F.2d 187 (D.C. Cir. 1963) (en banc), *cert. denied*, 373 U.S. 913 (1963). *But see Simer v. Rios*, 661 F.2d 655, 675-76 (7th Cir. 1981); *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977).

42. See *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977). *But see Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980).

43. FED. R. CIV. P. 26(d)(1). See discussion of available measures in C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, vol. 7B, § 1792, at 288-94.

44. See *In re Agent Orange Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982); *In re Three Mile Island Litig.*, 87 F.R.D. 433, 434-35 (M.D. Pa. 1980). See also W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* (1983); Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

individual damages,<sup>45</sup> and trying certain issues first in anticipation of further settlement.<sup>46</sup>

A court should similarly consider whether procedural devices could also reduce the disadvantages of duplicative litigation without resort to a class action. These would include consolidation and transfer,<sup>47</sup> multidistrict treatment for coordinated discovery and pre-trial,<sup>48</sup> attorney groups,<sup>49</sup> and use of test cases and creative scheduling to insure a preclusive effect on other suits.<sup>50</sup> Thus again, "superiority" will depend upon a comparison of the amenability of the class action versus that of multiple suits to efficient procedures.

The four "superiority" factors just discussed apply only to (b)(3) classes, but they involve considerations that also arise in (b)(1) and (2) class actions. Although (b)(1) and (2) classes by their very nature possess features suggesting the "superiority" of class treatment, the kind of efficiency considerations spelled out in the four "superiority" factors are often helpful in assessing whether mandatory class treatment is appropriate. As will be discussed, the decisions to certify a mandatory class and to enjoin duplicative litigation are interrelated, and thus we will again encounter considerations similar to the "superiority" factors in focusing on the injunctive effect of (b)(1) and (2) class actions.<sup>51</sup>

## II. INJUNCTIONS AGAINST DUPLICATIVE LITIGATION

Principles of comity require that courts of coordinate jurisdiction, such as federal courts, exercise "forbearance" by "avoiding interference with the process of each other."<sup>52</sup> Principles of federalism provide an additional constraint on a federal court's interference with state courts. Nevertheless, the propriety of one court's issuing an injunction to prevent duplicative

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45. See *In re Swine Flu Immunization Prods. Liab. Litig.*, 495 F. Supp. 1185 (W.D. Okla. 1980). See also Meites & Aborn, *Distributing the Settlement Fund in a Class Action*, 7 LITIGATION No. 4, at 33 (1981).

46. See *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 n.8 (5th Cir. 1986) (discussing "reverse bifurcation"); *Friends for All Children, Inc. v. Lockheed Aircraft*, 87 F.R.D. 560 (D.D.C. 1980). See also McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 THE FORUM 1, 12-13 (1983).

47. See *supra* note 3. For a discussion of bifurcation incident to consolidation, see 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2390-91, at 296-304 (2d ed. 1986).

48. See Note, *supra* note 4, at 607-08.

49. See Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

50. See 3B J. MOORE & J. KENNEDY, *supra* note 14, ¶ 23.45[3], at 23-356-57; McGovern, *supra* note 46, at 12-13.

51. See *infra* text accompanying notes 88-106, 144-57.

52. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922) (quoting *Cavell v. Heyman*, 111 U.S. 176, 182 (1884)).

litigation in another court has long been recognized in appropriate cases. For example, it is a long-standing rule that a court, federal or state, must have the power to protect its jurisdiction over a *res*, and this includes the power to enjoin an interfering proceeding.<sup>53</sup> A corollary is that the pendency of duplicative *in personam* actions is not a basis for enjoining either the continued prosecution or the institution of related suits in other courts.<sup>54</sup> Injunctions should be directed against the parties who are before the court, rather than the other court itself.<sup>55</sup> In such cases, it is the contempt power against the party before the court that serves to enforce the injunction.<sup>56</sup>

### A. Duplicative Suits in Different Federal Courts

When duplicative litigation takes place entirely within the federal court system, the use of an injunction does not raise federalism concerns, and the principal considerations are efficiency, economy, and justice. A federal district court has the power to enjoin the filing of related lawsuits in other federal courts.<sup>57</sup> Such an injunction may, in appropriate cases, run against non-parties, as well as parties.<sup>58</sup> Federal courts of coordinate rank, however, owe each other comity in the sense of respecting each other's orders and avoiding hindering each other's proceedings.<sup>59</sup> This is not as demanding as the deference demanded of federal courts to certain kinds of state proceedings under abstention doctrines<sup>60</sup> or the Anti-Injunction Act.<sup>61</sup> But it requires clear justification before a federal court may interfere with the jurisdiction of another federal court.

#### 1. Injunction Against Prosecuting Existing Suits

Recognition of another federal court's prior jurisdiction is a basic principle of comity. Thus the first suit filed should have priority "absent the showing

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53. See 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, *MOORE'S FEDERAL PROCEDURE* ¶ 0.214 (2d ed. 1985).

54. See *infra* text accompanying note 137.

55. See *State ex rel. General Dynamics Corp. v. Luten*, 566 S.W.2d 452 (Mo. 1978). But see *Wright & Colussi, The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L. REV. 141, 148 n.28. (1984) (courts have not addressed whether other courts can be enjoined from proceeding).

56. See 11 C. WRIGHT & A. MILLER, *supra* note 47, § 2960, at 581-91.

57. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952).

58. *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972).

59. *Schauss*, 757 F.2d at 654; *Mann Mfg. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971).

60. See, e.g., *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (stay of federal suit in interests of "wise judicial administration"); *Younger v. Harris*, 401 U.S. 37 (1971) ("Younger abstention"); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("Burford abstention"); *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941) ("Pullman abstention").

61. See *infra* text accompanying notes 110-43.

of balance of convenience in favor of the second action" or of special circumstances.<sup>62</sup> Courts are accorded broad discretion in determining the balance of convenience.<sup>63</sup> For example, special circumstances overcoming the first-in-time rule have been recognized in patent cases for a "customer action" when the first suit is against a customer of the alleged infringer and the second is against the infringing manufacturer.<sup>64</sup> The justification is that the primary wrongdoer is the manufacturer, and that priority should not be given to a first-in-time suit against the customer if the later suit against the manufacturer can fully resolve the issues.

Another significant factor as to the propriety of an injunction against duplicative suits in other federal courts arises when a court has assumed direction or control over receivership property, as in a securities fraud case<sup>65</sup> or bankruptcy proceedings.<sup>66</sup> It may be necessary to enjoin related litigation to insure the orderly administration of receivership property. This consideration is related to the long-held principle that "one court, federal or state, shall not disturb the possession and control of specific property which is within the prior jurisdiction of the other court."<sup>67</sup>

The nature and scope of each related suit is a further consideration in determining the propriety of an injunction against other federal suits. If one suit involves all necessary parties and appears to offer resolution of all the issues while a second related suit does not, assertion of jurisdiction in the first suit would constitute the fairest and most efficient means of disposing of the litigation. And if that court determines that the related suit threatens the timely and orderly disposition of the matter before it—as by the risk of conflicting orders, dissipation of parties' time and resources, or unnecessary confusion of res judicata principles upon final judgment—an injunction against prosecution of the related suit is appropriate.

When one federal court certifies a class action, it should have some preference, given the utility of class actions for resolving matters in a unitary suit. Efficiency considerations, however, may cut the other way when an existing individual action is first in time and the litigants and court have already undertaken considerable preparation in anticipation of trial or settlement.

In *re Asbestos School Litigation* provides an example of a clash of the injunctive powers of an existing-action court and a class-action court. On April 23, 1984, Judge James Kelly of the United States District Court for

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62. *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 423 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 948 (1966).

63. *Kerotest*, 342 U.S. at 183.

64. *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 179 (2d Cir. 1969); *Mattel*, 353 F.2d at 424.

65. *SEC v. Wencke*, 622 F.2d 1363 (2d Cir. 1980).

66. *Diners Club, Inc. v. Bumb*, 421 F.2d 396 (9th Cir. 1970).

67. 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, *supra* note 53, ¶ 0.214, at 2365.

the Eastern District of Pennsylvania certified, under Rules 23(b)(1)(B) and 23(b)(2), a mandatory nationwide class of schools against three major asbestos producers (who did not oppose class certification) for costs incurred in removing asbestos used in school construction.<sup>68</sup> In his certification order, Judge Kelly enjoined the filing of new suits, as well as the prosecution of pending state or federal suits, against the three defendants.<sup>69</sup>

Two suits by Texas school districts, consolidated under the name *Dayton Independent School District v. United States Gypsum Co.*,<sup>70</sup> had been filed three years earlier in the United States District Court for the Eastern District of Texas against a number of defendants including the three defendants in the class action certified by Judge Kelly. At the time the class was certified, these two suits were set for trial within three months, but because of Judge Kelly's injunction, the parties ceased activities in them.<sup>71</sup> On May 14, 1984, the *Dayton* plaintiffs obtained from Judge Robert Parker (of the United States District Court for the Eastern District of Texas) a preliminary injunction enjoining the three defendants "from taking any actions whatsoever that would adversely affect or prejudice the rights of plaintiffs to prosecute their claims or causes of action in this Court."<sup>72</sup> A month later Judge Parker made the injunction permanent, enjoining both plaintiffs and defendants from prosecuting or defending the cases "in any other court" and enjoining "all proceedings in the United States District Court for the Eastern District of Pennsylvania which entail in any manner the controversy in the above styled and numbered cause."<sup>73</sup>

The lines of conflict were clearly drawn; each court had exercised its equitable power to protect its jurisdiction by enjoining the parties from prosecuting the cases pending in the other court. Judge Parker noted that he had conferred with Judge Kelly,<sup>74</sup> but apparently they were unable to resolve the matter. Judge Parker noted that the cases before him were first in time,<sup>75</sup> but expressed reluctance "to determine choice of forum by rigid mechanical application of a general rule."<sup>76</sup> He relied instead on "practical

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68. *In re Asbestos School Litig.*, unpublished order (April 13, 1984) (described in *In re Asbestos School Litig.*, 104 F.R.D. 422, 426 (E.D. Pa. 1984)). It was estimated that of some 36,000 public school districts and private schools in the United States, 8,500 manifested asbestos abatement problems. *Asbestos School Litig.*, 104 F.R.D. at 428.

69. *Id.*

70. *Dayton Indep. School Dist. v. United States Gypsum Co.*, Civil Action No. B-81-277-CA (E.D. Tex. filed Apr. 22, 1981); *Evadale Indep. School Dist. v. United States Gypsum Co.*, Civil Action No. B-81-293-CA (E.D. Tex. filed Apr. 27, 1981) (consolidated Mar. 22, 1983).

71. See *Dayton Indep. School Dist.*, unpublished order of June 28, 1984, at 5.

72. *Dayton Indep. School Dist.*, unpublished order of May 14, 1984, at 2.

73. *Dayton Indep. School Dist.*, unpublished order of June 28, 1984, at 7.

74. *Id.* at 6.

75. *Id.* at 4.

76. *Id.* at 3.

and equitable realities," finding an injunction necessary because his court had invested considerable time and effort in holding pre-trial conferences and hearings, the cases were set for trial within a couple of months, and subsuming these two cases under the class action "would cause prodigious delay and thwart justice."<sup>77</sup>

Judge Parker's order strongly pointed up the concerns of the Texas plaintiffs that their trials not be delayed, but it did not explore the countervailing arguments that, in order to achieve its purposes, the mandatory class action needed to prevent this duplicative litigation. There was, for example, no consideration of whether the trial of the individual suits would undermine the effectiveness of the class action (as by establishing contrary injunctive orders, depleting a limited fund, or posing serious preclusion conflicts) or whether there might be reasonable alternatives to exclusive class action jurisdiction for efficiently resolving the totality of the claims.

Judge Parker did suggest doubts as to whether the class certification was appropriate given the conflicts among the various participants. He mentioned several factors, including the legitimacy of Judge Kelly's action in certifying the class, whether the class representative was adequate, the lack of uniformity of state laws, his court's experience in asbestos litigation compared with Judge Kelly's inexperience, charges of collusion between defendants and the plaintiff's class representative, and the opposition of forty-five of the defendants to the class certification.<sup>78</sup> These factors were indeed relevant insofar as they raised doubts about the ability of Judge Kelly to hold the mandatory class action together and as to whether his certification order would survive appellate scrutiny. The plaintiffs in the Texas cases should not be delayed in obtaining their scheduled trial if there was real uncertainty as to whether the class action was viable. In fact, Judge Parker's doubts were ultimately justified when the Third Circuit reversed the certification of a mandatory class; it found that the record and findings were inadequate to support the procedure necessary for certifying a "limited fund" class and that the class, as certified, was under-inclusive.<sup>79</sup>

The conflict between Judges Kelly and Parker was not to be resolved by a higher court; two months after Judge Parker issued his preliminary injunction, Judge Kelly modified his injunction to exclude existing suits<sup>80</sup> (although he did ultimately certify a limited mandatory class with restrictions on opt-out rights<sup>81</sup>). Judge Kelly made no reference to Judge Parker's order, but observed that his own injunction had been challenged as violating due

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77. *Id.* at 4-5.

78. *Id.* at 5-6.

79. *In re Asbestos School Litig.*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 182, 318 (1986).

80. *In re Asbestos School Litigation*, 594 F. Supp. 178 (E.D. Pa. 1984).

81. *See infra* text accompanying notes 171-84.



process (in the case of existing suits in federal courts) and the Anti-Injunction Act (in the case of existing suits in state courts).<sup>82</sup> He said he "need not reach either question" because he concluded that "the better course is to abstain from exercising jurisdiction in the interest of fostering comity among coordinate jurisdictions and giving appropriate deference to courts whose jurisdiction had attached first."<sup>83</sup>

The injunctive dispute between Judges Kelly and Parker in the asbestos school litigation appears to have been properly resolved in favor of allowing the existing Texas cases to go forward. But whether all existing federal court cases, no matter when filed or how far progressed, should also have been allowed to continue is a different question. If, for example, the viability of the class action had not been so problematical, or the grounds for fearing a depletion of a limited fund had been more compelling (as when it was shown that a large number of class members with existing cases would also assert the right to individual treatment), the balance might have tipped in favor of a class-action court injunction against existing suits.

The conflict between Judges Kelly and Parker was ultimately resolved by accommodation. But that is not always possible when two courts perceive the balance of considerations differently. Significant interests of parties and the judicial system are at stake, and accommodation to the desires of another court may not always be the proper resolution. Each court should accord deference to the other regarding its assessment of the case before it; the class-action court has more expertise and evidentiary opportunity to determine the propriety of the class action and the need for a protective injunction, while the existing-case court has more expertise in judging how far the cases before it have progressed and the impact of a prohibition order on the individual plaintiffs. But ultimately, each court has to make its own assessment of the efficiencies and fairness of an exclusive class action versus continuance of the existing suits. If they reach differing assessments, there may be conflicting injunctions and a higher appellate court may have to resolve the matter.<sup>84</sup> Such conflicts between courts of coordinate rank are undesirable, and the use, at least in the federal court system, of an authority like the Panel on Multidistrict Litigation<sup>85</sup> to resolve any such conflict might be a desirable innovation.

## 2. Injunction Against Filing Future Suits

The same considerations of comity, efficiency, and fairness just discussed in reference to a federal court's injunctive power to prevent prosecution of

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82. *Asbestos School Litig.*, 594 F. Supp. at 179.

83. *Id.*

84. This might be accomplished by an interlocutory appeal from an injunction or by a mandamus action by an aggrieved party challenging an injunction that restrains him from prosecuting the suit in another court. See MARCUS & SHERMAN, *supra* note 1, at 721-25.

85. See *supra* note 5.

existing federal suits applies to the filing of future federal suits. However, the propriety of enjoining class members from filing future suits especially raises considerations regarding the right to opt out. In a (b)(3) class action, the right to opt out is guaranteed by Rule 23(c)(2), and an injunction against filing future suits would arguably be violative of that right.<sup>86</sup> On the other hand, the act of certification of a mandatory (b)(1) or (2) class action presumptively carries with it a denial of a right to opt out, and has been seen by some courts as equivalent to an injunction against initiating future suits following class certification.<sup>87</sup> Thus the injunctive power to prevent filing of future suits is intimately connected with the decision as to what type of class action is certified. An injunction against filing future suits is presumptive in a (b)(1) or (2) class action, while the presumption is to the contrary in a (b)(3) class action.

a. Preemptive Effect of a Mandatory (b)(1) Class Action

A suit involving familiar names for sports fans provides a good example of the injunctive effect of class certification on future suits in a mandatory class action. In *Robertson v. National Basketball Association*,<sup>88</sup> Oscar Robertson and thirteen other NBA players brought a class action on behalf of all present and future players in a federal court in New York against the two professional basketball associations and member teams. Alleging that such practices as the player draft, reserve clause, and reserve compensation plan violated the antitrust laws, the action sought declaratory and injunctive relief and damages. It was certified as an "incompatible standards" (b)(1)(A) class, and notice was sent to all players that they would be bound by the adjudication, but could apply to the court for leave to intervene and to be represented by an attorney of their choosing.

Wilt Chamberlain then filed his own suit in a federal court in California, complaining of the same practices, but as particularly applied to his situation in which he would have to compensate his prior team, the Lakers (for whom he had refused to play during the previous year), if he wanted to play for another team. The federal court in New York enjoined Chamberlain from prosecuting his suit. It found that he sought the same relief and challenged the same practices as did the class action, and thus was required to assert

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86. See *infra* text accompanying notes 246-64.

87. In *re* Federal Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir. 1982) (finding that certification constitutes an injunction subject to interlocutory appeal under 28 U.S.C. § 1292(a), but also noting that the trial court had expressly prohibited class members from settling their punitive damage claims). But see *Holmes v. Continental Can Co.*, 760 F.2d 1144 (11th Cir. 1983) (although absent (b)(2) class members have no automatic right to opt out, denial of that right may constitute abuse of discretion in appropriate cases, as here regarding monetary relief in settlement of a Title VII action).

88. 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

any injury from those practices in the class action. It observed that "minor variations in the restraints at issue do not constitute new antitrust claims that are outside of these proceedings" and that "what happened to Chamberlain is merely another variation on the allegedly anti-competitive practices challenged in this lawsuit."<sup>89</sup>

One might ask whether Chamberlain was denied due process by being relegated to the remedy of a class action judgment that did not address his particular injury. The district court, however, cited *Hansberry v. Lee*<sup>90</sup> for the proposition that there is no denial of due process in binding class members to a court's judgment so long as there is notice and adequate class representation. But what is the value of notice if there is no right to opt out? A response is that the need to prevent duplicative litigation in a (b)(1)(A) class action is so critical that the individual right to opt out must give way to a single resolution. "To allow two actions so similar in nature to proceed," the district court in *Robertson* said, "would place an unfair burden on defendants" who, "without the protection of this injunction, would face the possibility of inconsistent declaratory or injunctive mandates prescribing their future compliance with the antitrust laws."<sup>91</sup> Given these overriding considerations, it was incumbent on Chamberlain, if he desired to recover for injuries unique to his situation, to seek to intervene so that his situation could be presented by his attorney as part of the class action proceedings or to seek such consideration by the class action attorneys.<sup>92</sup>

Since *Robertson*, the Supreme Court has addressed the due process issue in more depth with reference to class action jurisdiction over out-of-state plaintiffs, adequacy of notice, and the right to opt out. In *Phillips Petroleum*

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89. *Robertson v. National Basketball Assoc.*, 413 F. Supp. 88, 90 (S.D.N.Y. 1976), *aff'd*, 622 F.2d 34 (2d Cir. 1980).

90. *Id.* at 90 (citing 311 U.S. 32 (1940)).

91. *Id.* at 91.

92. The Second Circuit also rejected Chamberlain's contention that the lower court was without jurisdiction to determine the res judicata effect of its judgment in his California action. He contended that he had been denied due process by the fact that the class action settlement did not address his special injuries. The circuit court noted that his attorney had appeared at the settlement hearing, Chamberlain had accepted part of the settlement proceeds, and "[t]he jurisdiction of the courts of equity to prevent relitigation of questions settled as between the parties before the court has long been established." 622 F.2d 34, 35 (2d Cir. 1980). Circuit Judge Oakes, concurring, observed that Chamberlain had not objected to the settlement on the condition that his rights to continue his California litigation were not affected and that the New York federal judge had properly refused to rule on the res judicata issue. *Id.* at 36. *Cf.* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, § 1789, at 245 ("[I]t is well settled that the court adjudicating a dispute cannot predetermine the res judicata effect of its own judgment: that can be tested only in a subsequent suit.") However, Judge Oakes found that Chamberlain had presented no facts to the district court to show his case was not a variation of the class action and thus there was "no basis for concluding either that the settlement fund should be higher because of appellant's special situation or that the distribution formula should be revised." *Id.* at 36.

*Co. v. Shutts*,<sup>93</sup> it held that a court may exercise jurisdiction over the claim of an absent class-action plaintiff, even without minimum contacts, provided there is minimum due process, that is, notice, an opportunity to be heard and participate in the litigation, and a right to opt out. But in a footnote, the *Shutts* Court limited this holding to class actions predominately for money judgments, expressing no view concerning "other types of class action lawsuits, such as those seeking equitable relief."<sup>94</sup> The close identification of (b)(1) class actions with traditional equitable remedies that insured unitary jurisdiction over the matter suggests that the mandatory (b)(1) class action is still compatible with due process (as is, *a fortiori*, the equitable (b)(2) injunctive action).<sup>95</sup>

#### b. Preemptive Effect of a Mandatory (b)(2) Class Action

Class certification of a (b)(2) action is also tantamount to enjoining future suits by class members. The *raison d'être* for a (b)(2) class—that injunctive relief is applicable to the class as a whole—would be undermined if duplicative suits could result in conflicting judgments. For example, a plaintiff's suit for declaratory and injunctive relief against the Chicago Police Department for violating his constitutional rights by keeping unofficial reports known as "street files" was dismissed on the ground that the same relief was sought in a pending class action in which he was a member. His claim for damages, however, was permitted to go forward.<sup>96</sup>

Certification of a (b)(2) class may also warrant enjoining duplicative litigation by persons opposing the class. In *Coleman v. Block*<sup>97</sup> the federal court in North Dakota certified a nationwide class of farmers with loans from the Farmers Home Administration and enjoined the Administration from foreclosing loans without complying with certain procedures. Thereafter the Fifth Circuit held that a federal court in Texas should not have proceeded with a foreclosure suit by the Administration against a Texas farmer. The injunction by the class-action court was necessary, it said, in order to accomplish the purpose of the class action.<sup>98</sup>

Class actions to remedy jail and prison conditions are a paradigm of the need for a (b)(2) injunctive class action to be able to prevent future suits. The inherent nature of the class action provides the justification. In *Goff*

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93. 105 S. Ct. 2965 (1985).

94. *Id.* at 2975 n.3.

95. See *infra* text accompanying notes 256-64.

96. *Reese v. Chicago Police Dept.*, 602 F. Supp. 441 (N.D. Ill. 1984).

97. 562 F. Supp. 1353 (D.N.D. 1983) (certifying (b)(2) class and granting preliminary injunction); 580 F. Supp. 192 (D.N.D. 1983) (expanding preliminary injunction to nationwide class); 580 F. Supp. 194 (D.N.D. 1984) (certifying nationwide class).

98. *United States v. Nolder*, 749 F.2d 1128 (5th Cir. 1984).

*v. Menke*,<sup>99</sup> for example, the Eighth Circuit held that the district court incorrectly heard a prisoner's rights suit by a member of a class action dealing with the same issues. The court insisted that the district court respect the injunctive effect of class certification in another court in order to achieve "[t]wo of the primary goals of Fed. R. Civ. P. 23 . . . avoidance of both duplicative litigation and inconsistent standards."<sup>100</sup>

In administering a massive class action suit over a period of time, procedures must be established to scrutinize claims of class members to determine their similarity to matters pending before the class-action court or addressed by a decree over which the class-action court has continuing jurisdiction. The *Ruiz v. Estelle* class action,<sup>101</sup> involving conditions in the Texas prison system, is a case in point. The Fifth Circuit ruled that suits by prisoner class members that asserted "legal or equitable claims directly related to or dependent upon rights adjudicated and incorporated in the *Ruiz* injunctive decree" must be dismissed.<sup>102</sup> As to those claims, class members were left with the following remedies: (1) to go "to the class attorney, or the the court's special master to urge consideration of motions to the *Ruiz* court for additional equitable relief or sanctions against any party violating its injunctions," (2) to seek to intervene in the class action, or (3) to "object to the binding effect of a class action judgment, on the ground that they are not or were not adequately represented in the class action."<sup>103</sup>

The Fifth Circuit also had to decide what courts would screen prisoner civil rights suits to determine whether the claims had to be dismissed because they were related to the *Ruiz* decree. Initially, it ruled that all suits by prisoner class members had to be filed in the federal district court that entered the decree (referred to as "the *Ruiz* court").<sup>104</sup> This was aimed at insuring that other courts did not undercut the decree and that similar standards would be applied to all cases. But apparently the case load was too heavy on that court, and the Fifth Circuit later modified its order, allowing prisoner suits to be filed in any court of proper venue (usually

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99. 672 F.2d 702 (8th Cir. 1982).

100. *Id.* at 704 (citing Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 100, 102-03 advisory committee's notes (1966)).

101. 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

102. *Green v. McKaskle*, 770 F.2d 445, 446 (5th Cir. 1985). Compare *Johnson v. McKaskle*, 727 F.2d 498 (5th Cir. 1984). See generally 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, § 1789.

103. *Green*, 770 F.2d at 446-47. Requests to intervene in inmate suits are often denied. But see *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324 (5th Cir. 1982) (remanding for further consideration lower court's denial of class members' request for intervention in a (b)(2) class action and stating that a higher showing of adequacy of representation is necessary to deny intervention under Rule 24(a) than under the "representativeness" requirement of Rule 23(a)(4)).

104. *Johnson*, 727 F.2d at 501.

where the prisoner was incarcerated).<sup>105</sup> This meant that suits could be filed in a number of federal or state trial courts in which Texas prison facilities are located.

It might appear anomalous that a state court should have the power to determine whether a class member's suit is subsumed under the federal decree or may proceed separately. Indeed, the federal class action court would seem to have the authority, in aid of its jurisdiction and in order to effectuate its judgment, to prevent other courts from making that judgment.<sup>106</sup> But the Fifth Circuit decided differently as a matter of practicality rather than of authority, an example of a situation in which the prevention of litigation in other fora was not deemed to be necessary to achieve the purposes of the class action.

### c. Countervailing Effect of the Opt-Out Right in a (b)(3) Class Action

Unlike (b)(1) and (2) class actions, (b)(3) class actions carry no preemptive effect on duplicative litigation. The very right to opt out suggests that duplicative litigation is expected, at least insofar as necessary to give effect to the opt-out right. Nevertheless there may be occasions on which duplicative litigation could seriously jeopardize the effectiveness of a (b)(3) class action. There has been growing recognition of this possibility, but the nonmandatory nature of a (b)(3) class action seems antithetical to according a right to limit duplicative litigation. The possibility of hybrid forms of (b)(3) class actions, which are not purely mandatory or nonmandatory, will be explored in the next section on "Federal/State Court Duplicative Litigation."<sup>107</sup>

An additional consideration in assessing the possibility that a (b)(3) class action might be allowed to prevent duplicative litigation is that any limitation on class members' rights to file future suits raises due process questions. The due process issue is not unique to the all federal litigation situation, applying where a federal court enjoins state court litigation as well. However, because it more frequently arises in the context of duplicative state court litigation, it will be discussed in the next section.<sup>108</sup>

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105. *Johnson v. McKaskle*, No. 82-2472, unpublished order (deleting Part III of original opinion, 727 F.2d 501 (1986)).

106. See *infra* text accompanying notes 134-43. Cf. *Donovan v. City of Dallas*, 377 U.S. 408 (1964) (state class-action court may not enjoin a parallel class action in a federal court); *Harris v. Pernsley*, 755 F.2d 338 (3d Cir. 1985) (pendency of state court injunction in an earlier inmate class action would not warrant federal court abstention in inmate class action seeking damages for the first time, and *res judicata* did not apply because of insufficient identity of causes of action). But see *Parsons Steel, Inc. v. First Alabama Bank*, 106 S. Ct. 768 (1986) (where state court ruled that judgment in parallel federal court action was not a bar under *res judicata*, federal court could not invoke the "to protect or effectuate its judgments" exception to the Anti-Injunction Act to avoid according full faith and credit to the state determination of preclusion effect).

107. See also *infra* text accompanying notes 240-58.

108. See also *infra* text accompanying notes 252-58.

### B. Federal/State Court Duplicative Litigation

When federal courts are faced with duplicative litigation in state courts, efficiency and justice concerns may justify an injunction, but federalism considerations may seem to prohibit it. A federal court's obligation to avoid interfering with a state court, the Supreme Court has said, is more than a matter of comity, constituting a principle of necessity that "leaves nothing to discretion or mere convenience" in requiring respect for the independence of a sovereign court with concurrent jurisdiction.<sup>109</sup> These federalism principles are reinforced by the explicit prohibition in the Anti-Injunction Act against federal courts' granting "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>110</sup>

#### 1. Injunction Against Prosecuting Existing Suits—Anti-Injunction Act Constraints

The Anti-Injunction Act prohibits an injunction against the prosecution of existing state court suits, but not the filing of future cases. Timing is therefore an important consideration. There is a difference of opinion as to whether the Act applies to state suits filed *after* a federal court suit was filed, but *before* a federal court injunction against parallel state litigation is granted. The Seventh Circuit in *Barancik v. Investors Funding Corp. of New York*<sup>111</sup> took the position that if state court proceedings have not been filed at the time a motion to enjoin state court actions is made in the federal court proceeding, the Act does not apply and the federal court may issue an injunction. The rationale is that parties should not be allowed to short-circuit a federal court's jurisdiction by filing a state court action while the federal court is considering a request for preliminary injunctive relief. Otherwise, federal courts might be encouraged to routinely grant preliminary injunctions against duplicative litigation in order to preserve their jurisdiction. On the other hand, the Sixth Circuit in *Roth v. Bank of the Commonwealth*<sup>112</sup> held that under the Act a federal court may not enjoin the filing of later-filed state court proceedings unless it has actually moved to protect its jurisdiction by preliminarily enjoining the filing of other suits. This conflict has not been resolved by the Supreme Court.

The Anti-Injunction Act has often been viewed as overriding efficiency and fairness considerations that might otherwise justify an injunction against

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109. *Kline*, 260 U.S. at 229.

110. 28 U.S.C. § 2283 (1982).

111. 489 F.2d 933 (7th Cir. 1973).

112. 583 F.2d 527 (6th Cir. 1978).

state litigation. It is not so clear, however, that its federalism concerns are intended to supplant the countervailing efficiency and fairness concerns that arise from a Rule 23 class action. Thus, in the class action context, there is a potential clash between the policies of Rule 23 and the Anti-Injunction Act which is glossed over by prevailing judicial notions of the Act as trumping all other considerations.<sup>113</sup>

The Act's history provides no easy answer as to its proper application in the class action context.<sup>114</sup> A provision prohibiting the issuance of federal writs of injunction to stay state court proceedings was passed by the First Congress in 1793.<sup>115</sup> It is not at all clear that it had a federalism purpose as opposed to narrower objectives regarding the proper scope of equity jurisdiction.<sup>116</sup> In 1872 it was interpreted as an absolute bar to federal injunctions of state proceedings,<sup>117</sup> but federal courts established broad exceptions thereafter.<sup>118</sup> In 1941, the Supreme Court in *Toucey v. New York Life Insurance Co.*<sup>119</sup> accorded the Act new respect, rejecting the judicially-created "relitigation exception" that had allowed a federal court to enjoin a state court from relitigating a matter previously decided in the federal court. Justice Frankfurter took the view that the Act's purpose was to avoid conflict between federal and state courts by preventing federal interference with state proceedings.<sup>120</sup>

Congress responded to *Toucey* in 1948 by redrafting the Act to incorporate three previously-established exceptions, "as generally understood and interpreted prior to the *Toucey* decision."<sup>121</sup> The Supreme Court has since warned against creating other exceptions by "loose statutory construction."<sup>122</sup>

Under the first exception to the Anti-Injunction Act—"as expressly authorized by Act of Congress"—a class action has generally been held to be in no better position than a non-class action to enjoin duplicative state suits

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113. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

114. See 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4221, at 308 (2d ed. 1986) (the original Act's intent is "lost in the mists of history").

115. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 333, 334.

116. See Larimore, *Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Statute Reconsidered*, 18 GA. L. REV. 259, 268 (1984); Reaves & Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294, 296 (1971); Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 366-67 (1930).

117. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 719 (1872).

118. See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132-36 (1941). Commentators in the early twentieth century stated that "the statute has long been dead" because of the exceptions. Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1169 (1932).

119. 314 U.S. 118.

120. *Id.* at 135.

121. Act of June 25, 1948, ch. 646, 62 Stat. 968 (1948) (codified at 28 U.S.C. § 2283 (1982), historical and revision notes (1976)).

122. *Atlantic Coast Line*, 398 U.S. at 287.



since Rule 23 has not been held to be an "expressly authorized" statutory exception. The Supreme Court set out the test for this exception in *Mitchum v. Foster*: "whether an act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."<sup>123</sup> Rule 23(d) allows a federal court to "make appropriate orders," among other things, to determine the course of proceedings, impose conditions on parties, or deal with other procedural matters.<sup>124</sup> The Fifth Circuit, however, held in *Piambino v. Bailey* that Rule 23(d) does not satisfy the "expressly authorized" statutory exception because a federal rule of civil procedure does not create a "right or remedy" enforceable in a federal court of equity.<sup>125</sup>

One commentator, Steven Larimore, has argued that a federal rule can, under appropriate circumstances, meet the *Mitchum* test.<sup>126</sup> While the Rules Enabling Act requires that a federal rule "not abridge, enlarge or modify any substantive right,"<sup>127</sup> a rule can accord an equitable remedy, as in the case of Rule 23's allowing through the class action an aggregation of rights that enhance the full realization of state-created substantive rights.<sup>128</sup>

Dicta in the Third Circuit's opinion in *In re Glenn W. Turner Enterprises Litigation*<sup>129</sup> arguably lends some support to the position that the "expressly authorized" statutory exception can be invoked by Rule 23. There a federal district court certified a (b)(3) class action on behalf of persons who had been victimized by the promoters of the "Dare to Be Great" pyramid scheme. The court, fearing that the defendants would not be able to satisfy all the judgments against them, enjoined the class members from instituting or continuing any actions in state or federal court based on Turner's activities, and from enforcing state judgments already obtained. The Third Circuit found that Rule 23 was not an exception to the Anti-Injunction Act, "at least for actions such as this one brought under 23(b)(3)."<sup>130</sup> Its reasoning was that since (b)(3) class members must be given the right to opt out, "Rule 23 by its own terms creates a mechanism leaving parties in a (b)(3) action

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123. 407 U.S. 225 (1972). In *Vendo Co. v. Lektro-Bend Corp.*, 433 U.S. 623 (1977), the Court, with three separate opinions, applied *Mitchum* to find that § 16 of the Clayton Act was not an expressly authorized exception. For a view that the *Mitchum* analysis of express exceptions to the Anti-Injunction Act was directed at lessening the impact of *Younger* on civil rights cases, see Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1209-15 (1977).

124. FED. R. CIV. P. 23(d).

125. 610 F.2d 1306 (5th Cir. 1980). The Second Circuit followed *Piambino* in *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985), as discussed *infra* at text accompanying note 208.

126. Larimore, *supra* note 116, at 274-84.

127. 28 U.S.C. § 2072 (1982).

128. See Larimore, *supra* note 116, at 282.

129. 521 F.2d 775 (3d Cir. 1975).

130. *Id.* at 781.

free to continue with any state proceedings" and thus it cannot be said that a (b)(3) class action can "be given its intended scope only by the stay of a state court proceeding."<sup>131</sup> *Turner* might be read, however, as leaving open the possibility that Rule 23 is an exception in the context of a mandatory (b)(1) or (2) class action (as opposed to a (b)(3) action) which might only achieve its "intended scope" by staying a state court proceeding.<sup>132</sup>

Interpreting Rule 23 as an express exception when it can only achieve its intended objectives of efficiency and justice by preventing state duplicative litigation would help to reconcile the conflicting policies of Rule 23 and the Anti-Injunction Act in certain cases. But *Turner* is a slim reed on which to base a challenge to the prevailing judicial position that Rule 23 is not an express statutory exception. And even if the "intended scope" analysis is stretched to reach the mandatory class action, there is the additional problem that a federal rule is not an Act of Congress. A functional argument might be made that a federal rule (which results from a combination of congressional and judicial powers)<sup>133</sup> constitutes the kind of authoritative singling out of federal interests that Congress intended to exempt from the Act. But it must be conceded that existing precedents lend little support for an express class action exemption from the Act.

The second exception—"where necessary in aid of its jurisdiction"—offers more promise for class actions. This has been narrowly interpreted as requiring not merely that the requested injunction relate to the court's jurisdiction, but also that it is essential "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>134</sup>

Not every invocation of jurisdiction by a federal court entitles it to enjoin state litigation in aid of its jurisdiction. Courts have looked to those situations in which federal courts have historically been permitted to protect their

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131. *Id.* (quoting *Mitchum*, 407 U.S. at 238). *Turner* also held that the "in aid of its jurisdiction" exception was not satisfied. It found that the alleged inability of defendants to pay state court judgments was insufficient because, despite the filing of Chapter XI proceedings, there was no finding that the defendants would be unable to pay any federal judgment. Furthermore, it stated, "the inability of defendants to pay a judgment, assuming it exists, still would not be sufficient justification to issue the federal injunction" because of the rule against enjoining parallel *in personam* state proceedings. *Id.* at 780.

132. Larimore, *supra* note 116, argues that "the *Turner* court apparently assumed" that Rule 23(b)(3) satisfied the Act of Congress requirement because it went on to deal with the *Mitchum* "intended scope" issue. But the court could equally have felt that there was no need to consider the "Act of Congress" requirement when the case was so clearly not within the intended scope.

133. See *Hanna v. Plumer*, 380 U.S. 460, 463-64, 471 (1965) (passage of a federal rule is a *prima facie* judgment by the Advisory Committee, the Supreme Court, and Congress that it transgresses neither the terms of the Rules Enabling Act nor the Constitution).

134. *Atlantic Coast Line*, 398 U.S. at 295.

jurisdiction by preventing duplicative litigation elsewhere.<sup>135</sup> The Supreme Court's 1922 decision in *Kline v. Burke Construction Co.* distinguished between *in rem* and *in personam* actions in resolving jurisdictional conflicts between federal and state courts.<sup>136</sup> As a matter of historical equity practice and efficiency, the first court obtaining jurisdiction over a *res* would be allowed to enjoin duplicative litigation in order to confine the proceeding to a single forum so that the purposes of the remedy would not be undermined.<sup>137</sup> But when two duplicative actions were *in personam*, the actions would be allowed to proceed concurrently and "an injunction could not issue to restrain a state action *in personam* involving the same subject matter from going on at the same time."<sup>138</sup>

Despite the general prohibition on enjoining duplicative *in personam* litigation, federal interpleader actions under Rule 22, even though *in personam*, have been recognized as satisfying the "in aid of jurisdiction" exception.<sup>139</sup> The fact that they involve laying before the court the issue of who has the right to property or a fund allows them to be analogized to *in rem* proceedings. The most expansive use of the *in rem* analogy has been in school desegregation cases where the pendency of an injunctive action has been found sufficient to justify enjoining state suits that would undermine the remedy and effective compliance.<sup>140</sup>

The third exception—"to protect or effectuate its judgment"—restored the "relitigation" exception which had been rejected by *Toucey*. It allows a federal court to enjoin relitigation of matters barred by *res judicata* or collateral estoppel where an appealable judgment has been entered.<sup>141</sup> There is some disagreement among the courts as to the degree of finality required for a judgment to be entitled to injunctive protection.<sup>142</sup> The advisory com-

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135. The equitable bill of peace, the forerunner of the class action, allowed a unitary suit by or against representatives of a group where joinder would not have been allowed. See 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 17, § 1751, at 7-11. It was invoked in *In re Asbestos School Litig.*, 620 F. Supp. 873, 876 (E.D. Pa. 1985), as providing an historical justification for a mandatory class action. See *infra* note 176.

136. 260 U.S. at 229-32.

137. 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, *supra* note 53, ¶ 0.214, at 2359.

138. 3B J. MOORE & J. KENNEDY, *supra* note 14, ¶ 23.92, at 23-570.

139. *United States v. Major Oil Corp.*, 583 F.2d 1152, 1158 (10th Cir. 1978); *Emmco Ins. Co. v. Frankford Trust Co.*, 352 F. Supp. 130, 133 (E.D. Pa. 1972).

140. See C. WRIGHT, *LAW OF FEDERAL COURTS* 284 n.48 (4th ed. 1983). See also *infra* text accompanying note 212. Federal bankruptcy cases (see *supra* note 66) and "limitation" proceedings in admiralty (see *Complaint of Paradise Holdings, Inc.*, 795 F.2d 756 (9th Cir. 1986)) routinely enjoin pending state suits in the interests of preserving the property or fund before them.

141. *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45, 49 (7th Cir. 1976); *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 396 F. Supp. 678, 684-85 (N.D. Tex. 1975). See also *supra* note 106.

142. See *Commerce Oil Refining Corp. v. Miner*, 303 F.2d 125, 128 (1st Cir. 1962) ("[o]n occasion protectible rights may be conferred by something short of a final judgment"); 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 114, § 4226, at 345-47.

mittee notes speak vaguely of "the power to enjoin relitigation of cases and controversies fully adjudicated."<sup>143</sup> In the class action context, where there are often lengthy and complex proceedings designed to result in settlement, there are efficiency reasons for according protection against duplicative litigation at an earlier stage than a final judgment. These considerations will be discussed in a following section.

## 2. The Punitive Damage Class Action Cases—Disparate Attempts to Define the Relationship Between Mandatory Class Certification and Injunctive Power

Anti-Injunction Act precedents have a mechanical quality that reflects a judicial attitude going back to *Toucey* that the Act is an absolute barrier to prevent federal court interference with state suits. It is only recently that increased resort to federal class actions has raised difficult questions as to whether the Act permits some degree of accommodation with potentially conflicting class-action objectives. As parties have turned to federal class actions in an attempt to resolve legal claims with multistate or nationwide impact, the desirability of preventing duplicative litigation has become more pressing. The most significant movement has been the attempt to certify mandatory class actions for punitive damages in mass tort situations. These cases have provided the principal testing ground for attempts to expand the boundaries of mandatory class actions, and coincidentally for the power of federal class-action courts to prevent duplicative state litigation.

### a. Injunctive Effect as Bar to Certifying a Mandatory Punitive Damage Class Action

One approach to mandatory punitive damage class actions has been to focus on the injunctive effect of the class certification to determine if it is consistent with the Anti-Injunction Act's "in aid of its jurisdiction" exception. This was the approach taken by the Eighth Circuit in *In re Federal Skywalk Cases*.<sup>144</sup> There the district court judge, Judge Scott O. Wright, had certified a class under Rule 23(b)(1)(A) and (B), composed of all persons having claims arising out of the collapse of two skywalks in the Hyatt Regency Hotel in Kansas City in 1981. He additionally enjoined the class members from settling their punitive damage claims in existing suits pending the class action trial.<sup>145</sup> The Eighth Circuit, in a majority decision by Judge McMillian, found this violated the Anti-Injunction Act, rejecting the argu-

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143. 28 U.S.C. § 2283 historical and revision notes (1976).

144. *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *rev'd*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

145. *Skywalk*, 93 F.R.D. at 425-28.

ment that the risk of exhausting the resources of the defendant by individual punitive damage claims warranted invoking the "in aid of its jurisdiction" exception.<sup>146</sup>

The Eighth Circuit found no apt analogy to federal interpleader jurisdiction that restricted claims to identifiable property, a limited fund, or pecuniary obligation to a single forum. Here, the circuit court said, "the class has an uncertain claim for punitive damages against defendants who have not conceded liability" and thus "does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader."<sup>147</sup> It also rejected the argument that allowing individual actions would nullify the purpose of the class, finding that this was simply a case of concurrent *in personam* actions in federal and state courts as to which, both historically and under the Anti-Injunction Act, the federal court had no power to enjoin the state actions.<sup>148</sup>

Judge Heaney, dissenting, took a very different view of the relationship between mandatory class actions and the Anti-Injunction Act. A mandatory class action, he argued, necessarily "has a restrictive effect on related proceedings in any other court—state or federal," and thus "[i]f certification of a mandatory class is proper, as here it clearly is, then the ordinary rules of such actions simply preclude independent litigation of class claims in state or federal courts."<sup>149</sup> Given the nature of a mandatory class action, he found it "self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class."<sup>150</sup> The majority's emphasis on the lack of power to enjoin duplicative *in personam* actions, he found, "ignores that it is a mandatory class action we are considering under the Anti-Injunction Act."<sup>151</sup> That doctrine "developed around and applies to independent, *individual* claims, not mandatory class actions."<sup>152</sup>

Judge Heaney's equating the mandatory-class certification decision with the power to enjoin duplicative litigation makes a certain sense. Certification of a (b)(1) class action, which carries no opt-out right, is a recognition that duplicative litigation would seriously impair its purposes. If jurisdiction means more than the filing of a case but also contemplates a court's authority to dispose of it effectively, the impairment of a class action's objectives would seem to justify triggering the "in aid of jurisdiction" exception. Of

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146. *Skywalk*, 680 F.2d at 1175.

147. *Id.* at 1182.

148. *Id.* at 1182-83.

149. *Id.* at 1191 (Heaney, J., dissenting).

150. *Id.* at 1192. Judge Heaney also indicated that Missouri law was uncertain as to whether multiple punitive damage awards were allowed. *Id.* at 1187. If an award of punitive damages to the first litigant to receive a judgment would preclude awards to other plaintiffs, there would be an even stronger justification for a mandatory class.

151. *Id.*

152. *Id.* at 1193.

course, the federalism concerns of the Anti-Injunction Act must be satisfied, but the majority made no attempt to analyze whether they could be satisfied through some sort of accommodation with the efficiency concerns of the class-action court.

Judge Heaney proposed such an accommodation. Troubled by the lower court's injunction against class members settling their existing punitive damage claims, he would have modified the order to allow punitive damage claims to be settled and to give the defendants credit for settlements when and if there were a classwide award of punitive damages.<sup>153</sup> He thus viewed the coercive power of a mandatory class-action court as not necessarily embracing a prohibition on settlement. There is a valid efficiency rationale for this: settlement is a more economical resolution than even the class action and should be encouraged to the extent that it removes cases from the class-action litigation stream. Punitive damage settlements, unlike jury awards, are not likely to be for extraordinarily high amounts and thus to deplete a limited fund. The carving out of such hybrid opt-out rights demonstrates an attempt at balancing federalism concerns against the necessities of class-action litigation. Narrowing the injunction so as not to interfere with state court settlements arguably invokes the least coercive measures needed to protect the limited punitive damages fund *and* to insure the purpose of the (b)(1)(B) class action.<sup>154</sup>

There has been a good deal of criticism of the majority *Skywalk* decision. From an historical position, it is argued that the court read Rule 22 interpleader jurisdiction too narrowly and that interpleader, as a device to enable a stakeholder to protect his interest in a limited fund besieged by claims, has been upheld in spite of its preemptive effect on state litigation.<sup>155</sup> Judge Wright, the lower court judge, described it as the loss of a critical mechanism

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153. *Id.* at 1184. The administration of such a credit, however, could pose problems. Safeguards would have to be taken to insure against defendants making early settlements with a limited number of plaintiffs who would be willing to characterize the entire settlement as punitive damages, thus obtaining a cost-free way to obtain a set-off against the expected federal court punitive damages award.

154. A number of considerations affect the willingness of parties to settle punitive damage claims only. A defendant might want to settle all claims at one time and be reluctant to make a payment for punitive damages while still exposed to indeterminate damages, such as pain and suffering, in which jury distaste for its conduct might still play a part. Likewise, a plaintiff might be unwilling to give up the bargaining chip of a high punitive damage award which supports his compensatory damage claims. On the other hand, clearing the air of the uncertainty of punitive damage claims can sometimes lead quickly to settlement of more determinate compensatory claims. It is possible that some discovery as to the nature of compensatory claims would be desired by the parties before considering settlement of punitive damage claims. In such case, the federal class action court could allow limited discovery on the pending individual punitive damage claims.

155. Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1159-60 (1983).

that "offers economy of effort and uniformity of result."<sup>156</sup> Certainly the Eighth Circuit's approach gave scant importance to the peculiar efficiency and fairness benefits offered by a (b)(1) class, viewing the Anti-Injunction Act as a bar that foreclosed the kind of policy considerations which are appropriate in an all-federal context.<sup>157</sup>

b. Mandatory Class Requirements As Bar to Certifying Punitive Damage Class Action

For a number of courts, the requirements of Rule 23(b)(1)(B), rather than the Anti-Injunction Act, constituted the principal bar to certifying a mandatory punitive damage class action. They did not focus on whether class certification carries with it the power to enjoin existing state litigation and thus did not reach the Anti-Injunction Act issue. Rather, by applying the (b)(1)(B) requirements strictly, they effectively ruled that, in the particular case, there was no power to create a non-opt-out class and thus class members could not be enjoined from pursuing their existing individual suits.

In the *Dalkon Shield IUD Products Liability Litigation*, trial judge Spencer Williams certified a nationwide (b)(1)(B) "limited fund" class as to punitive damages, and a statewide (b)(3) class as to compensatory damages, for persons harmed by the use of the Dalkon Shield intrauterine device.<sup>158</sup> The Ninth Circuit reversed both certifications.<sup>159</sup> Although Judge Williams had found a potential for constructive bankruptcy based on the pendency of 1,500 suits seeking compensatory damages of \$500 million and punitive damages of \$2.3 billion,<sup>160</sup> the circuit court determined that the requisites for a "limited fund" class were lacking. It did not rule that a punitive damage class may never be certified as a "limited fund" class when there is an insurance fund and the claims could drive the defendant into bankruptcy.<sup>161</sup> However, it laid down a stringent standard that a "limited fund" class is not appropriate in "mass tort actions for compensatory or punitive damages unless the record establishes that separate punitive awards *inescapably* will affect later awards."<sup>162</sup>

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156. *Skywalk*, 93 F.R.D. at 424. See also Wright & Colussi, *supra* note 55.

157. See *supra* text accompanying notes 57-85.

158. *In re Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188 (N.D. Cal. 1981) (order), 526 F. Supp. 887 (N.D. Cal. 1981) (opinion), *vacated*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

159. *California "Dalkon Shield"*, 693 F.2d 847.

160. *California "Dalkon Shield"*, 526 F. Supp. at 893.

161. *California "Dalkon Shield"*, 693 F.2d at 851-52.

162. *Id.* at 851 (emphasis added) (citing *McDonald Douglas Corp. v. United States Dist. Ct., Central Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975)). It also reversed the (b)(3) class certification, finding insufficient typicality, superiority to other methods, and commonality as to the events giving rise to injury, proximate cause, and affirmative defenses. *Id.* at 852-56.

In *In re Agent Orange*, by contrast, Judge Jack Weinstein certified a (b)(1)(B) punitive damages class for veterans and family members who suffered damages from the veterans' exposure to Agent Orange in Vietnam.<sup>163</sup> He adopted a more liberal "substantial probability" standard for the "limited fund" requirement, noting the importance of class certification since otherwise large numbers of class members would be unable to carry out the expensive task of litigating the complex issues involved.<sup>164</sup> Nevertheless, he concluded that it could not be found here, as a preliminary matter, that the compensatory and punitive damages would in substantial probability exceed the defendants' assets.<sup>165</sup>

Judge Weinstein relied on a different theory—what has been called the "punitive damages overkill"<sup>166</sup> or "limited generosity" theory<sup>167</sup>—for satisfying the "limited fund" requirement. He reasoned that although the purpose of punitive damages is not compensatory, there must be some limit, "as a matter of policy or as a matter of due process," on the amount of times a defendant can be punished.<sup>168</sup> Here, he found, there was a substantial probability that if no mandatory class were certified, non-class members who opt out would either receive all of the punitive damages, or, if their cases were not completed first, none at all. Therefore, the prosecution of individual suits could as a practical matter be dispositive of the interests of class members not parties to the adjudication.<sup>169</sup>

Judge Weinstein was not willing to decide at the certification stage whether the mandatory class carried with it a prohibition against opting out. He said that "need not be decided now," noting that it was not clear that any appreciable number of plaintiffs would exercise their right to opt out of the (b)(3) compensatory damage class nor that punitive damages would be awarded.<sup>170</sup> His approach thus suggests that the power to enjoin existing

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163. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *petition for writ of mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

164. *Agent Orange*, 100 F.R.D. at 726 ("the proper standard is whether there is substantial probability—this is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets").

165. *Id.* at 727.

166. *In re Asbestos School Litig.*, 104 F.R.D. 422, 434 (E.D. Pa. 1984); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 42 (1986) (distinguishing this from the "constructive bankruptcy" theory applied in such cases as *Dalkon Shield*).

167. *Asbestos School Litig.*, 789 F.2d at 1005-06 (limited generosity "is the functional equivalent of the limited fund in that, by operation of the limited generosity principle, only a limited amount of punitive damage funds will be available, regardless of the ability of the defendants to pay").

168. *Agent Orange*, 100 F.R.D. at 728.

169. *Id.*

170. *Id.*



litigation is not necessarily determined by certification itself and might be better determined, as needed, in the future.

In *re Asbestos School Litigation* is the most recent appellate decision to address a mandatory punitive damage class.<sup>171</sup> Judge Kelly, whose first unsuccessful attempt to enjoin existing litigation has been discussed,<sup>172</sup> did not give up the fight. Having withdrawn his injunction against prosecution of existing state cases, he modified his tentative certification of a mandatory (b)(1) and (2) class to certify a nationwide opt-out (b)(3) class for compensatory damages, plus a nationwide mandatory (b)(1)(B) punitive damage class.<sup>173</sup> Building on the limited opt-out rights proposed by Judge Heaney in *Skywalk*, he adopted a modified injunctive rule that "any litigant who chooses to opt out of the Rule 23(b)(3) class will be permitted to settle punitive damage claims, and that the defendants will receive credit for any such settlements when and if there is a classwide award of punitive damages."<sup>174</sup>

The effect of Judge Kelly's certification order was to create a sort of hybrid (b)(1)(B) class that was only mandatory if the class member sought to pursue the separate trial (as opposed to settlement) of his punitive damage claims. Allowing class members to opt out of the compensatory damage class and to settle existing claims for punitive damages would remove some of the onerousness of the mandatory class action. It would still interfere, however, with the full enjoyment by class members of their rights to pursue existing state litigation. Unless they could settle their punitive damage claims, they would have to go to trial in state court solely on their compensatory damage claims and wait until there was a classwide award in the federal court for resolution of their claims for punitive damages. Nevertheless, in comparison with the absolute rejection of a mandatory class in *Skywalk* and *Dalkon Shield*, it arguably represented a more reasonable balance between protecting the limited punitive damage fund and honoring class members' interests in individual litigation.

Having certified the mandatory class, Judge Kelly was confronted again with the need to use coercive measures to prevent duplicative litigation. An existing case brought by a South Carolina school district was scheduled for trial in a South Carolina court, and the defendants sought to enjoin the plaintiff from proceeding with it.<sup>175</sup> Judge Kelly analogized a punitive damages action to equitable devices such as interpleader and bill of peace, finding that "[p]unitive damages, although an ancient legal remedy, is more similar

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171. *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part, vacated in part*, 789 F.2d 996 (2d Cir.), *vacated*, 791 F.2d 920 (1986).

172. See *supra* text accompanying notes 68-85.

173. *Asbestos School Litig.*, 104 F.R.D. at 422.

174. *Id.* at 438.

175. *Asbestos School Litig.*, 620 F. Supp. at 873.

to equitable relief in that it seeks to provide for a public good as does a criminal fine."<sup>176</sup> Avoidance of individual suits is necessary to insure fairness by protecting the defendant from successive punishments, as well as protecting the right of plaintiffs who may be "late comers seeking punitive damages when the 'pot of gold is gone.'" <sup>177</sup> He thus enjoined the plaintiff from individually litigating its punitive damages claim.

It was the Third Circuit this time that frustrated Judge Kelly's attempts at unitary resolution. Although recognizing the national dimensions of the asbestos problem, it found he had abused his discretion in certifying a mandatory nationwide class (it upheld, however, his certification of a (b)(3) opt-out class).<sup>178</sup> The circuit court found the record inadequate to raise the "limited generosity" variation of the "limited fund" theory since, unlike *Agent Orange*, there were no factual findings as to the potential amount and scope of punitive damages.<sup>179</sup>

The Third Circuit also found that the punitive damages class was under-inclusive; it did not include all property damage claimants (being limited to school districts) and excluded "tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed" and are "satisfied from the same pool of assets to which the school districts now look."<sup>180</sup> In *Agent Orange*, by contrast, all the claims against the defendants were concentrated in one case.

The circuit court viewed the effect of the under-inclusiveness as "singl[ing] out the school districts for special and possibly disadvantageous treatment" by forcing them to litigate in a jurisdiction and under a class procedure that many did not desire.<sup>181</sup> Their punitive damage claims were put "on hold," and, because of the delay, "the class could end up in a detrimental position if punitive damage awards are precluded because of a future judicial ruling."<sup>182</sup> The quest for punitive damages remains "a race to the courthouse door," and other non-class claimants are not restrained from pursuing their individual remedies as quickly as possible.<sup>183</sup> "In effect," the circuit court concluded, "a mandatory class action creates a bottleneck by concentrating the litigation,

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176. *Id.* at 876.

177. *Id.* at 875. He rejected plaintiff's interpretation of South Carolina law as considering punitive damages to be compensatory, finding that although a private person has the right/standing to sue for them, the purpose is to provide for the benefit of the public. Thus there is an obligation to insure fairness in the manner of recovery. *Id.*

178. *Asbestos School Litig.*, 789 F.2d at 996. The court found it unnecessary to reach the defendants' additional claims that the mandatory class was inconsistent with the Anti-Injunction Act and the due process considerations discussed in *Phillips Petroleum v. Shutts*. *Id.* at 1007-08.

179. *Id.* at 1005.

180. *Id.*

181. *Id.* at 1006.

182. *Id.*

183. *Id.*

at least for a period, before one judge instead of spreading the individual cases out among many trial forums."<sup>184</sup>

The *Asbestos School Litigation* reflects both progression and continuity in the line of mandatory punitive damage class action cases. A subtle change in attitude towards the use of class actions has taken place. The earlier cases like *Dalkon Shield* and *Skywalk* mirrored the admonitions in the Advisory Committee Notes<sup>185</sup> and the *Manual for Complex Litigation*<sup>186</sup> that mass tort cases were not generally suitable for class action treatment. The later cases like *Agent Orange* and *Asbestos School Litigation* showed a growing appreciation of creative techniques by which mass torts can be suitably resolved as class actions. Closely related to this more expansive view of the utility of the class action is an increased recognition of the need to restrict duplicative litigation to achieve class objectives. Thus *Agent Orange* was willing to certify a mandatory class that would prevent the conduct of other litigation, and *Asbestos School Litigation*, although refusing a mandatory class, did so only after a functional analysis that concluded that the existence of a limited fund had not been shown and that under-inclusiveness imposed unfair restraints on class members and undermined the purpose of the class. As will be discussed in a later section, this series of cases provides guideposts and insights which may aid in identifying the kinds of cases in which federal courts should be empowered to limit state court duplicative litigation.<sup>187</sup>

### 3. Federal Court Interests in Protecting Imminent Settlements Under Multidistrict Proceedings

The punitive damage class action cases dealt with a narrow application of the mandatory device that did not provide an opportunity for exploring the variety of interests that federal courts may have in other contexts for wanting to prevent duplicative litigation. One finds a more receptive approach to both comity and federalism concerns in non-tort contexts where distinctive federal court advantages for effectively disposing of class actions are threatened by state suits.

In *In re Corrugated Container Antitrust Litigation*,<sup>188</sup> an injunction against duplicative state suits by class members was upheld as necessary to protect the federal court's jurisdiction over a group of cases consolidated under the Multidistrict Litigation (MDL) proceedings where settlement agreements were

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184. *Id.* at 1007.

185. See Comments of the Federal Rules Advisory Committee, 39 F.R.D. 69, 103 (1966) ("a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action" and "would degenerate in practice into multiple lawsuits separately tried").

186. MANUAL FOR COMPLEX LITIGATION § 1.51, at 82 (West ed. 1982) ("it has been held that 'mass accident' suits are generally unsuitable for class action treatment").

187. See also *infra* text accompanying notes 225-64.

188. 80 F.R.D. 244 (S.D. Tex. 1978), *aff'd*, 659 F.2d 1332 (5th Cir. 1981).

far progressed. Fifty-two private treble damage actions brought in federal courts around the country on behalf of purchasers of corrugated containers against thirty-seven manufacturers were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the United States District Court for the Southern District of Texas. The federal district judge, Judge John Singleton, certified the consolidated case as a nationwide class action on behalf of all purchasers of corrugated containers (estimated in the hundreds of thousands).<sup>189</sup> Thereafter four corporations that were plaintiff class members filed suit in a South Carolina state court, seeking to represent all persons injured by the antitrust conspiracy in violation of South Carolina antitrust laws. The state complaint was almost identical to the consolidated complaint in the Texas court, and the plaintiffs' attorneys also represented the South Carolina plaintiffs in the Texas action.<sup>190</sup>

Judge Singleton enjoined the plaintiffs from pursuing the suit in South Carolina or any other court, and the Fifth Circuit affirmed.<sup>191</sup> It found this satisfied the "in aid of jurisdiction" exception to the Anti-Injunction Act. The plaintiff class had already entered settlement agreements with most of the defendants, and the South Carolina judge specifically enjoined the defendants from using any federal settlement document "in connection with any action pending in any Court" without its prior approval.<sup>192</sup> This, the Fifth Circuit said, was "[s]uch a limitation on the terms of settlement" as "would clearly interfere with the multidistrict court's ability to dispose of the broader action pending before it."<sup>193</sup>

The Fifth Circuit also invoked the "to protect or effectuate its judgment" exception, finding that the federal court had approved the settlements with most of the defendants at the time it issued the injunction and that final appealable judgments were therefore "predictable if not assured."<sup>194</sup> The "protection of judgment" exception, it said, was intended to apply where the state proceeding would be precluded by *res judicata*, which it found was the case here.<sup>195</sup>

Because of the alternate grounds for decision and the relatively short opinion, the scope of the *Corrugated Container* ruling is somewhat uncertain. There are a number of distinctive facts that could considerably narrow its holding, but it also contains language that suggests broader applications.

First, the South Carolina court had actually enjoined the defendants from using the federal court settlements and thus arguably was directly and

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189. *Corrugated Container*, 80 F.R.D. at 245.

190. *Corrugated Container*, 659 F.2d at 1334.

191. *Id.* at 1332.

192. *Id.* at 1335.

193. *Id.*

194. *Id.*

195. *Id.* (citing *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1312-14 (5th Cir. 1971)).

deliberately interfering with the conduct of the federal class action. What if it had simply proceeded with its class action suit, deferring a ruling on whether the federal settlements were *res judicata* until there was a final judgment in the federal case in Texas? Arguably the state court would then simply have exercised its jurisdiction without intentionally interfering with the federal settlements. But there is something troubling about this distinction. The impact on federal court settlements is the same whether it derives from a specific state court injunction or from the simple long-term impact of duplicative litigation. It is true that cases applying the Anti-Injunction Act have generally eschewed according weight to the incidental effect of duplicative litigation on a federal class action. However, *Corrugated Container* seems to recognize a distinctive federal court interest in avoiding the deleterious impact of duplicative state litigation, at least as to imminent judgments under MDL jurisdiction. Thus *Corrugated Container* would seem to allow an injunction, even if a state court had not formally tried to interfere with federal court settlements, so long as the appropriate federal interests were clearly at risk.

Second, since all of the thirty-seven defendants had not made settlement agreements in *Corrugated Container*, it must be asked how the federal court could enjoin state proceedings against *all* the defendants. Why were class members not entitled to pursue a separate state suit against the non-settling defendants?

It is apparent that the "protection of judgments" rationale would only justify an injunction against the settling defendants. Therefore, the alternate "in aid of its jurisdiction" rationale must provide the authority. In applying it, the Fifth Circuit was willing to look beyond narrow historical categories to a recognition that at some point in MDL class action litigation the "in aid of its jurisdiction" exception is triggered by the federal court's investment of time and resources and by the parties' expectations based on the federal class proceeding. "This complicated antitrust action," the Fifth Circuit said, "has required a great deal of the district court's time and has necessitated that it maintain a flexible approach in resolving the various claims of the many parties."<sup>196</sup> The presence of imminent settlements involving most of the defendants undoubtedly buttressed the conclusion that the point had been reached at which state duplicative litigation would not be permitted to interfere with the entire class action. On the other hand, had most of the defendants not settled, the injunction might not have been justified; plaintiffs should not be allowed to settle quickly with a minor defendant, perhaps at a bargain rate, simply to trigger an injunction against state court suits.

Third, we must consider the significance of the fact that the state court complaint followed the federal complaint almost verbatim, the plaintiff class

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196. *Id.* at 1334-35.

members' attorneys were identical, and the state suit was also a class action. These factors indicate that the state suit was not merely a reflection of the plaintiffs' desire to pursue their own cases in the forum of their choice, but was a concerted effort to disrupt or replace the federal class action. The state court plaintiffs' attorneys had been at odds with the attorneys who had key roles as class attorneys in the Texas federal class action.<sup>197</sup> The Fifth Circuit observed that "the policies of federalism are not flouted by this injunction" where the lower court judge specifically found that the state plaintiffs' attorneys had intentionally threatened "this court's exercise of its proper jurisdiction and the effectuation of its judgments, by filing and threatening to file duplicative and harassing litigation in the courts of various states and by seeking therein orders disrupting the proceedings in M.D.L. 310."<sup>198</sup> Thus a relevant factor in judging the propriety of a federal court injunction against duplicative litigation may be the motivation of the parties.

The South Carolina suit did differ from the federal class action in relying on state, rather than federal, antitrust laws. The state court plaintiffs argued that the state laws provided a different measure of damages than the federal, and therefore that the injunction would deprive them of due process.<sup>199</sup> The Fifth Circuit rejected this claim, finding no deprivation of property because the state law claims could be asserted as pendent claims in the federal suit.<sup>200</sup>

The degree of similarity between the claims in a federal class action and a duplicative state suit affects the propriety of a federal court injunction because of the possible impact of res judicata or collateral estoppel. If the duplicative state suit goes to judgment first, the preclusion effect could have a dire impact on the federal class action.<sup>201</sup> That concern would seem to be lessened in the *Corrugated Container* situation where the federal settlements were imminent and the federal suit might be expected to go to early judgment. But as a practical matter, it is often difficult to predict with assurance which cases will go to final judgment first or what the exact preclusion effects would be. As a result, the threat of adverse preclusion effects weighs in favor of a federal court injunction to protect its class action jurisdiction.

*Corrugated Container's* identification of special federal court interests in protecting settlements in MDL litigation was reinforced by the Second Circuit's 1985 decision in *In re Baldwin-United Corp.*<sup>202</sup> There some one-hundred federal securities suits brought against twenty-six broker-dealers by 100,000 holders of annuities issued by the now bankrupt Baldwin-United were consolidated under multi-district litigation proceedings and transferred to the

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197. See *Corrugated Container*, 659 F.2d at 1337.

198. *Id.* at 1336.

199. *Id.*

200. *Id.*

201. See *supra* note 5.

202. 770 F.2d 328 (2d Cir. 1985).

United States District Court for the Southern District of New York. For two years, Judge Briant of the Southern District of New York supervised coordinated settlement talks, resulting in eighteen of the twenty-six defendants signing stipulations of settlement.<sup>203</sup> Judge Briant provisionally approved a nationwide (b)(3) class action on behalf of all holders of Baldwin-United securities for the purpose of settlement.<sup>204</sup>

Only about fifty individual plaintiffs objected to the proposed settlement, but forty state attorneys general, many of whom had authority under state law to sue for their citizens in a representational capacity, objected that the settlement did not adequately compensate plaintiffs.<sup>205</sup> Many of the plaintiffs had raised pendent state-law causes of action, for instance claims under state consumer protection laws, and the proposed settlements would have extinguished all claims arising under federal and state laws.<sup>206</sup> When some of the attorneys general, who were not parties to the MDL class action, threatened to sue in state courts on behalf of their citizens under their state-law claims, Judge Briant enjoined them from filing suit. His injunction applied only to suits by the attorneys general in their representational capacity and not to those brought on behalf of the state to enforce state criminal or unlawful business practices laws.<sup>207</sup>

The Second Circuit upheld the injunction. It noted that since it was issued before suits were commenced in state court, the Anti-Injunction Act did not apply. However, since it found no independent authority in Rule 23(d) for a federal district judge to issue orders to protect class actions, it looked to the All-Writs Act for such power.<sup>208</sup> It noted that Anti-Injunction Act cases were "helpful in understanding the meaning of the All-Writs Act," and thus its analysis essentially tracked Anti-Injunction Act precedents.<sup>209</sup> By upholding the injunction under the arguably more stringent Anti-Injunction Act precedents, the court thus further eroded the strict historical approach under that Act.

The Second Circuit relied on the "in aid of its jurisdiction," rather than the "protection of its judgment," exception since the settlements were not final. But the progress of the class action to the point of provisionally approving settlements was central to its approval. A post-judgment injunction against state litigation, it said, would clearly be allowed: "[w]ere this not the case, the finality of virtually any class action involving pendent state

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203. *Id.* at 332.

204. *In re Baldwin-United Corp.*, 105 F.R.D. 475 (S.D.N.Y. 1984).

205. *Baldwin-United*, 770 F.2d at 332.

206. See *In re Baldwin-United Corp.*, Order Directing Hearing on Proposed Settlement and Providing for Notice Thereof, and Containing a Stay, MDL No. 581-CLB, p. 22 (Feb. 27, 1984).

207. *Baldwin-United*, 770 F.2d at 334.

208. *Id.* at 335. See *supra* text accompanying notes 110-43.

209. *Id.*

claims could be defeated by subsequent suits brought by the states asserting rights derivative of those released by the class members."<sup>210</sup> But even though the judgment was not final here, "the potential for an onslaught of state actions posed more than a risk of inconvenience or duplicative litigation; rather, such a development threatened to 'seriously impair the federal court's flexibility and authority' to approve settlements in the multi-district litigation."<sup>211</sup> That conclusion relied heavily upon the size, scope, and importance of the class action and the federal court's devotion of several years' time to bringing about the settlement.

Finally, the appellate court plugged in the historical justification for avoiding the Anti-Injunction Act. It found the MDL jurisdiction, as in the analysis of Professors Wright and Miller, was "analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts."<sup>212</sup> This was a case, it said, where "the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control."<sup>213</sup>

Eight of the defendants had not settled, but the Second Circuit saw no difficulty in extending the injunction to claims against them "[s]o long as there [was] a substantially significant prospect" that they would settle.<sup>214</sup> "Given the extensive involvement of the district court in settlement negotiations to date," it said, "and in the management of this substantial class action, we perceive a major threat to the federal court's ability to manage and resolve the actions against the remaining defendants should the states be free to harass the defendants through state court actions designed to influence the defendants' choices in the federal litigation."<sup>215</sup>

*Baldwin-United* is in some ways more expansive than *Corrugated Container*. The Second Circuit was willing expressly to extend the injunctive power to protect the entire class action, including the claims against the non-settling defendants. There was considerably less than unanimous agreement to the settlements by the parties in *Baldwin-United*; eight of the twenty-six defendants stayed out, and forty states, through the National Association of Attorneys Generals, objected to the settlements on the ground that they did not adequately compensate their citizens for their state and federal claims.<sup>216</sup>

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210. *Id.* at 336.

211. *Id.* at 337 (quoting *Atlantic Coast Line*, 398 U.S. at 295).

212. *Id.* (quoting 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 114, § 4224, at 105 n.8 (Supp. 1985)).

213. *Id.*

214. *Id.* at 338.

215. *Id.*

216. *Id.* at 331-33.



*Baldwin-United* represents an appropriate situation for enjoining duplicative litigation, but the Second Circuit too easily glossed over troubling considerations. The settlement agreements were essentially based on the federal securities claims, and scant attention was given to the various state pendent claims of the class members.<sup>217</sup> The securities laws in some of the states were more favorable to the plaintiffs, and thus the class members from those states should have had a stronger bargaining position for a more favorable settlement than other members of the class. But the certification of a nationwide class action for settlement purposes essentially ignored the state pendent claims, and Judge Brieant made no attempt to determine the differences in terms of substantive law and damages between class members from different states. Several individual class members did oppose the class certification, claiming that they possessed "unique rights" under their own state law that would not be adequately protected in the proposed settlement.<sup>218</sup> Judge Brieant rejected those objections on the ground that the "state law claims are not so special or unusual as to justify imposition by this Court of an involuntary exclusion from the settlement."<sup>219</sup> Thus, the upshot of Judge Brieant's certification of a settlement class, accompanied by an injunction against duplicative litigation, was that the pendent claims of the class members were sacrificed for a gross resolution of the dispute on a nationwide basis. This recalls Professor John C. Coffee Jr.'s analysis of opportunistic behavior by class representatives and class attorneys in trading-off the interests of certain groups for early settlement or benefits to the class as a whole.<sup>220</sup>

There were other methods by which the pendent claims of the class members could have been recognized and preserved. Subclasses could have been created for class members from states or groups of states with distinctive pendent claims, and any settlement would have had to address those claims.<sup>221</sup> The settlement class certified by the court could also have excluded the pendent claims. In *Lewis v. Capital Mortgage Investments*,<sup>222</sup> plaintiffs sought to certify a nationwide class of purchasers of stock inflated in price due to false and misleading statements, alleging claims under § 10b-5 of the Securities Exchange Act of 1934 and state common law fraud. The court limited the

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217. See *supra* text accompanying note 206.

218. See *In re Baldwin-United Corp.*, Memorandum and Order [Motion for Tentative Class Certification for Purpose of Settlement Hearing, and Notice of Proposed Settlement], MDL No. 581-CLB, p. 10 (Nov. 28, 1984).

219. *Id.*

220. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (Summer 1985).

221. See *Developments in the Law—Class Actions*, *supra* note 24, at 1479-82.

222. 78 F.R.D. 295 (D.C. Md. 1977).

class certification to the federal claims, noting that otherwise it "would involve the Court not only in a determination of which state law applies to each class member, but also in an interpretation and application of the laws governing common law fraud for most of the states."<sup>223</sup>

It is clear, however, that the negotiating defendants and plaintiff's representatives in *Baldwin-United* did not want to leave open the pendent claims. The defendants demanded the release of all claims the class members had against them, and, as the Second Circuit explained, any substantial risk of duplicative litigation "would threaten all of the settlement efforts by the district court and destroy the utility of the multidistrict forum otherwise ideally suited to resolving such broad claims."<sup>224</sup> That threat was a valid consideration in the federal court's determination that its special utility under MDL jurisdiction as to long-term negotiations at a stage of imminent settlement would be jeopardized by suits by the attorneys general or class members. But that does not mean that a federal class action court should simply put speedy classwide resolution above equitable treatment of all class members' claims. It may be that the state pendent claims were so weak or so similar to the federal claims that holding up a classwide settlement was not justified. But one would have liked to see some awareness by the district court and the Second Circuit of the trade-offs involved, some finding that minority class members' rights were not traded away for benefits to other class members, and some assurance that the courts provided a genuine monitoring function over the willingness of the class attorneys to settle.

Nevertheless the status of the settlement negotiations and the history of participation by the attorneys general provides a persuasive justification for enjoining further duplicative litigation in *Baldwin-United*. The fact is that the state attorneys general sat on the fence for the two years while settlement negotiations went on, choosing not to file or pursue individual state actions based on their citizens' pendent claims. By delaying to undertake independent litigation until the settlements were almost final, they created expectations in the parties and the court. In such a situation the policies underlying both the "in aid of its jurisdiction" and "to protect or effectuate its judgment" exceptions to the Anti-Injunction Act are invoked. Thus *Baldwin-United* represents an appropriate use of the injunctive power in recognition of the special utility of the federal class action, particularly in the MDL context,

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223. *Id.* at 307. This approach raises interesting res judicata issues. If this were an individual suit, the plaintiff might be faced with a claim of having split his causes of action. See *Marrese v. American Academy of Orthopaedic Surgeons*, 105 S. Ct. 1327 (1985) (remanding for a determination whether state res judicata law would foreclose later assertion of a federal antitrust claim which could not have been brought with the state law claim because of exclusive federal court jurisdiction). However, there may be valid justifications for relaxing res judicata rules where splitting the causes of action is necessary to achieve the purposes of a class action. See generally *Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794 (1984). See also *infra* note 5.

224. *Baldwin-United*, 770 F.2d at 337.

to effectively resolve nationwide class actions through settlement in a unitary suit.

#### 4. Emerging Themes in Determining When a Federal Class Action Court Can Limit Duplicative Litigation

##### a. Functional Analysis

There is a trend towards functional analysis in determining class certification and mandatoriness issues. The early cases read the Anti-Injunction Act (*Skywalk*) and the traditional basis for mandatory class actions (*Dalkon Shield*) as unequivocal barriers that left little room for balancing interests or weighing in efficiency concerns. *Agent Orange* and *Asbestos School Litigation*, on the other hand, took a more flexible view of the significance of historical models, focusing instead on the objectives to be served by class treatment in the particular case. The MDL cases (*Corrugated Container* and *Baldwin-United*) painted with a broad brush, looking to the overall utility of the particular class action at the moment in time when the injunction was sought. When the Anti-Injunction Act precedents were invoked, a liberal reading was given to the historical models.

Rule 23 permits room for a functional, rather than strictly historical, analysis. Although its drafting history indicates that historical practices were considered in crafting the categories of class actions in the 1966 amendments,<sup>225</sup> the categories were nevertheless phrased in terms of function rather than form. The definitions of (b)(1) and (2) classes are not frozen in a historical time warp or limited to historical remedial forms. Thus there should be room to embrace new structures and hybrid versions if they satisfy the policies intended by the rule. The creative use of the "limited generosity" theory in *Agent Orange* (later implicitly accepted in *Asbestos School Litigation*) to qualify as a (b)(1)(B) class<sup>226</sup> and of hybrid opt-out conditions proposed by Judges Heaney and Kelly to allow a limited prohibition on duplicative litigation<sup>227</sup> are in this spirit.

When duplicative cases are pending in state courts, however, the Anti-Injunction Act stands as a forbidding barrier to the functional analysis just proposed. As applied in *Skywalk*, the "in aid of its jurisdiction" exception was narrowly confined to the historical categories that permitted injunctive relief against other litigation.<sup>228</sup> But it is not obvious from the language of

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225. See Wright, *Class Actions*, 47 F.R.D. 169 (1969); Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

226. See *supra* text accompanying notes 163-70.

227. See *supra* text accompanying notes 153-54, 174.

228. See *supra* text accompanying notes 144-48.

the Act that historical, rather than functional, analysis is mandated.<sup>229</sup> The crux of the Act's prohibition on enjoining state litigation is a concern for preserving federalism and maintaining respect for the sovereign rights and interests of the states. It thus reflects an awareness of the particularly harsh effect of an injunction on the independence of a concurrent sovereign court system. However, there is no reason that the concerns of federalism can not be preserved by a functional analysis that is not bound to historical forms.

The punitive damage class action cases other than *Skywalk* did not address the scope of the Anti-Injunction Act, focusing instead on Rule 23's requirements for a mandatory class certification. But the inquiries, though differently focused, have similar objectives. Once the federalism concerns of the Act come into play, the question is whether the threat of duplicative litigation is so serious that the interests of the plaintiffs in litigating existing cases in a state forum of their choice and of the states in providing that forum must give way to unitary resolution in a federal court. The Anti-Injunction Act requires that this judgment be made on the basis of federalism concerns and not merely on considerations of efficiency and justice. But a mechanical reliance on historical models, as seen in *Skywalk*, does not necessarily serve the ends of federalism. A functional analysis that weighs the degree of invasion of state interest against the efficiency and purpose of unitary federal resolution should adequately preserve the federalism concerns protected by the Act.

The historical models serve better as examples, than as exclusive categories, for judging when and how duplicative litigation can be limited. The determination in *Agent Orange*, for example, that only a nationwide federal class action could insure that a limited punitive damages fund would be available for class members satisfies the kinds of concerns addressed by the historical equitable devices.<sup>230</sup> Although Judge Weinstein deferred a decision as to opt-out rights, he surely contemplated future limitations on the prosecution of existing state litigation and believed they would be consistent with the Anti-Injunction Act. This sort of melding of Rule 23 and the Anti-Injunction Act is consistent with the emerging functional analysis.

The Third Circuit's analysis of the under-inclusiveness problem in *Asbestos School Litigation* is also an example of a more functional kind of analysis. In its view, the mandatory class could not serve its claimed purpose of preserving the punitive damage fund, given the inability of the federal court to control the tempo of non-class litigation.<sup>231</sup> Thus the unitary resolution promised by the federal court class action was a chimera because the limited fund was likely to be exhausted by litigants not included in the class, and

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229. See *supra* text accompanying notes 114-22.

230. See *supra* text accompanying notes 163-70.

231. See *supra* text accompanying notes 178-84.

the class members, bound by the cumbersome class action procedure, were put at a disadvantage *vis-à-vis* those non-class litigants. The court might be faulted for not examining whether a way could have been found to preserve a fund solely for schools or to coordinate with other courts to prevent the class from being disadvantaged in a race to judgment.<sup>232</sup> But it still engaged in the kind of functional analysis that eschews narrow historical parameters.

The MDL cases also took a functional approach to the injunctive issue. *Corrugated Container* and *Baldwin-United* viewed the federal class action in the particular case as an entity which, in light of the progress made towards speedy ultimate disposition in an efficient manner, was entitled to protection against the deleterious effects of duplicative litigation. Both cases presented facts indicating that duplicative litigation would be harmful and reflected more than merely the class members' preference for individual suits. The degree to which the federal court had invested time and resources in the case and the parties had developed expectations based on class-action developments was also an important factor. Significantly, the appellate courts viewed the federalism concerns as matters to be resolved in the individual case rather than under abstract categories. This would seem to leave open the possibility of protective injunctions in cases with the functional equivalent of MDL jurisdiction involving imminent settlements.

#### b. Advantages of Federal Class Action

The mandatory class action and injunctive cases also show an increasing recognition of the unique advantages of the federal class action in certain situations for the efficient and equitable resolution of duplicative litigation. *Agent Orange*, for example, emphasized that the claims of the class members would probably never be resolved without a nationwide federal class action and that equity, in light of the limited funds available to pay punitive damages, could not be accomplished in any other way. *Asbestos School Litigation* praised the trial judge's valiant attempts to achieve equity and efficiency in the morass of asbestos school cases around the country.<sup>233</sup> It was with regret that it concluded that the nationwide class action device was not suitable.

Recognition of the peculiar advantages offered by a federal class action should be a central element of mandatory class certification analysis. Federal courts possess certain procedural abilities lacking in state courts which permit the efficient disposition of multiple-party litigation through or by coordination with a class action—such as the liberal procedural provisions of Rule 23, transfer to a single court for pre-trial disposition under the Multi-District

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232. See *supra* text accompanying note 245.

233. *Asbestos School Litig.*, 789 F.2d at 1000-01, 1011.

Litigation proceedings, and liberal transfer and consolidation provisions.<sup>234</sup> Federal courts are especially suited to handling nationwide class actions, and recent developments in conflicts of laws and jurisdiction make nationwide class actions ever more feasible.<sup>235</sup> Furthermore, federal court regional, state, or district-wide classes can provide economies not available in state litigation.

Federal courts also possess advantages that arise more from institutional differences than from legal rules. The federal judiciary is better staffed than most state trial courts for handling complex class action litigation and for coordinating and disposing of duplicative litigation efficiently. Few state trial judges have the support of law clerks, secretaries, and satellite court personnel that are commonplace in federal courts. A federal district court may be able to obtain special personnel and resource assistance for a particularly demanding case. The usual caseload of a federal district judge involves the kind of civil rights, securities, antitrust, mass tort, and commercial litigation that often give rise to class actions and duplicative litigation. The class action was pioneered in federal courts, and most federal judges and magistrates are familiar with the process and, by virtue of ongoing training programs, with developing techniques for efficient disposition.

State courts, by contrast, are often dependent on limited budgets based on expectations of the volume disposition of cases whose subject matter is unrelated to the matters that give rise to class actions and duplicative litigation. State courts, of course, could develop the budgetary and institutional support needed for efficient disposition of duplicative suits, but this would require considerable changes in structural and political processes in many states. Furthermore, state courts remain limited in their authority, lacking coercive powers over duplicative litigation outside their own jurisdictions.

*Corrugated Container* and *Baldwin-United* are examples of cases that could not have been resolved in a unitary suit without the MDL jurisdiction of federal courts. These decisions reflect the appellate courts' awareness of the special advantages, both in economy and fairness, for obtaining a speedy final resolution without the uncertainties and inconsistencies threatened by duplicative litigation. The likelihood of imminent settlement was an important consideration in both cases favoring invocation of the injunctive power,

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234. See *supra* notes 3-4. In granting stays it is appropriate for federal courts to consider the advantages of a class action. See *Taunton Gardens Co. v. Hills*, 557 F.2d 877 (1st Cir. 1977)(upholding stay to allow nationwide class action to proceed to resolution); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 704 (D.C. Cir. 1971) ("[t]here is more reason to await the disposition of another action if that is being maintained as a class action").

235. *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965 (1985), has made nationwide class actions, federal or state, more feasible if the choice of law and minimum contacts issues can be resolved favorably. However, the lack of a nationwide institutional presence and limited jurisdiction will continue to make state nationwide classes less desirable than federal ones and compound the problems of choice of law and minimum contacts problems. See generally *Miller & Crump*, *supra* note 166.

but MDL jurisdiction may also offer unique advantages not directly related to settlement. A federal district judge to whom duplicative cases have been assigned under MDL possesses powers to coordinate discovery, set up shared data banks and computerized litigation support systems, hold hearings or proceedings in any part of the country, use other federal judges for certain functions, sever issues and bifurcate trials, use test case litigation, and enforce judgments easily throughout the country. In a particular case, a combination of these advantages should be given consideration in determining whether the federal court may protect its jurisdiction against duplicative litigation.

Of course, possible countervailing advantages of separate state court suits should also be considered in the calculus. Judges in some states are becoming increasingly sensitive to the availability of mechanisms to reduce duplication in similar cases, and a state court class action can offer some of the same advantages as a federal class action. A state court could, for example, identify and try a test case that will effectively resolve a large number of other cases, promote informal cooperation between counsel that results in unified discovery, or work out stay arrangements with other courts to allow its class action to proceed unimpeded.<sup>236</sup> In addition, a federal class action can pose problems not present in separate state suits—for example, questions of commonality due to different law, representativeness because of different rights in different states, and manageability due to the sheer size of a nationwide or regional class action.<sup>237</sup> The relative advantages and disadvantages of a unitary federal class action versus state court solutions for separate disposition of cases is thus a critical factor in determining how duplicative litigation will be treated.

### c. Hybrid Forms of Opt-Out Rights

From the duplicative litigation injunctive cases has emerged the fledgling idea that certification of a mandatory class action does not necessarily resolve all questions as to whether and to what extent injunctive relief will be needed

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236. See *supra* text accompanying note 50. See also *Schomer v. Jewel Cos.*, 614 F. Supp. 210 (N.D. Ill. 1985) (staying federal court class action where state court class action was further along in discovery).

237. See *supra* text accompanying notes 38-51. For proposals dealing with the mass tort problem, see Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986) (proposing federal court jurisdiction over dispersed, related litigation); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986) (proposing a Federal Mass-Tort Procedure Act requiring class treatment of mass-injury cases with more than 1000 claimants, with requests for exclusion subject to a judicial determination concerning the merits of separate proceedings); Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467 (1985) (proposing a Mass Exposure Tort Litigation Act to expand § 1407 to include consolidation for trial and appellate proceedings); Transgrud, *supra* note 40, at 843-48 (proposing joint trial of common-question class actions limited to punitive damages).

to prevent duplicative litigation. As in *Agent Orange*, there may be good reasons for making decisions as to opt-out rights and protective injunctions at some time after certification.<sup>238</sup> To be sure, predictability favors resolving the scope of opt-out rights and injunctive powers at the time of certification when possible. But the extent of the duplicative litigation problem may not always be recognizable at that time. A court should be entitled to determine, at some appropriate later time, to what extent certain class members, or groups of class members, might be allowed to pursue their existing cases, whether and under what conditions opt-outs will be allowed, and whether injunctions against other suits will be granted.

Consistent with this approach is the desirability of shaping hybrid forms of opt-out rights which do not necessarily conform to a rigid distinction between mandatory and nonmandatory class actions. It is true that such proposals have been unsuccessful thus far, as witnessed by the attempts by Judges Heaney and Kelly to certify a mandatory class with a right to opt-out limited to the settlement of existing suits.<sup>239</sup> Their proposals nevertheless suggest the attractiveness of hybrid opt-out rights and raise the question whether opt-out rights need necessarily be all or nothing. There would seem to be nothing in the definition of the three Rule 23(b) classes to prevent the attachment of hybrid opt-out conditions; indeed those definitions make no reference to the manner in which the duplicative litigation problem will be handled.<sup>240</sup> A tougher question is whether Anti-Injunction Act constraints can be avoided. This, as has been discussed, requires a willingness to view the Act's exceptions in functional terms and to recognize that there are means of accommodating the federalism concerns of the Act with the efficiency and fairness objectives of the particular class action.<sup>241</sup>

Hybrid opt-out rights would permit a federal court to determine that a case should be certified as a mandatory class action, but that its purpose would not be undermined by an exodus of class members as to whom mandatoriness is undesirable or troubling. Thus the court might resort to a mixture of jawboning, coordination with other courts, and carefully-tailored injunctions to achieve a quasi-unitary resolution of the class dispute, while allowing some slippage in the class to accommodate the reasonable expectations of the parties and the sovereign interests of state courts.

Limiting opt-out rights to the settling of existing cases is one such hybrid approach. It would protect the class action from some of the most serious effects of duplicative litigation—individual jury verdicts in which compen-

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238. See *supra* text accompanying note 170.

239. See *supra* text accompanying notes 153-54, 174. See also Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?* 16 U.S.F. L. REV. 1, 21-36 (1981) (proposing bar on punitive damages claims by opt-out plaintiffs).

240. See *supra* text accompanying notes 7-14.

241. See *supra* text accompanying notes 225-32.



satory or punitive damages may be so aberrationally large as to deplete a limited fund, and the possibility that earlier judgments in the individual suits would (through preclusion or as a practical matter) create incompatible standards or otherwise interfere with the effectiveness of the class action judgment. On the other hand, allowing settlement of existing cases would accord a modicum of respect to the individual preference for separate litigation by allowing those class members who have filed their own suits to settle them.

Another hybrid opt-out approach would be to allow class members to pursue their individual claims through a court-prescribed alternate dispute resolution (ADR) procedure. Consider, for example, a procedure like that adopted by Judge Robert Parker in the United States District Court for the Eastern District of Texas, in an attempt to avoid having to try the individual issues relevant to each claimant in a district-wide class action on behalf of plaintiffs exposed to asbestos.<sup>242</sup> Both plaintiff and defendant may agree to arbitrate the case using neutral arbitrators selected by mutual consent, with a right to a *de novo* trial in the district court. Plaintiff must waive punitive damages, and defendants must waive the state-of-the-art defense.<sup>243</sup> The practical effect in most cases is that the plaintiff need only prove his exposure and that such exposure caused his injuries.

Allowing individual resolution of cases through such an ADR procedure would permit a federal class action court to apply limitations—as on the amount and type of damages and the issues available—that would protect against depletion of a limited fund and avoid individual judgments resulting in incompatible standards. The ADR procedure was used by Judge Parker for a (b)(3) class action case in which he found insufficient proof of the danger of depleting a limited fund to certify a mandatory class,<sup>244</sup> but it might also be used as a hybrid opt-out technique in (b)(1) or (2) actions. In a mandatory class action, it would provide a way for class members to agree to be bound by certain findings or resolutions and yet to have a separate resolution of individualized issues. In that situation, the limited opt-out would serve as an adjunct to the class action, complementing its unitary resolution of the dispute.

A reasonable fear of allowing limited opt-out rights is that the class members who do not opt out could find themselves last in time behind the opt-outs in any attempt to reach a limited fund. That was the Third Circuit's

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242. Procedure adopted in connection with class certification in *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), M-84-193-CA, order entered Sept. 19, 1986. See discussion in Arthurs, *Texas Judge Rides Herd on Asbestos Suits*, LEGAL TIMES, May 19, 1986, at 1. See also *Two-Step Plan Set Up for Texas Asbestos Cases*, 5 ALTERNATIVES 33 (Mar. 1987).

243. *Id.*

244. *Jenkins*, 109 F.R.D. at 269.

concern about the mandatory class action in *Asbestos School Litigation* where the underinclusive class definition left non-class members free to make individual raids on the fund unconstrained by the laggard pace of the class action.<sup>245</sup> But that need not be the result if the recovery of opt-outs is limited (as by waiving punitive damages, or capping compensatory damages by an absolute sum or by a formula geared to an equitable allocation of the fund among potential claimants). In some cases, even broader opt-out rights might be allowed, as in suits where all class members' claims are small and there is therefore little likelihood of large numbers of opt-outs.

Hybrid opt-out rights offer special attractions for a potential (b)(1) and (2) class action that might otherwise be denied mandatory certification and thus be powerless to protect itself from the adverse effects of duplicative litigation. But if the ability to protect against duplicative litigation by restricting opt-out rights or enjoining other litigation is not necessarily bound to the class certification decision, could (b)(3) class actions also restrict opt-out rights that would jeopardize their objectives? Rule 23(c)(2) provides an opt-out right in (b)(3) classes,<sup>246</sup> but does that right foreclose the class-action court from ever using coercive measures to prevent an opting-out class member from pursuing his case in another court while the class action is being litigated? The exact nature of the Rule 23(c)(2) opt-out right—such as whether it entails full and absolute freedom to conduct duplicative litigation—has not been addressed by courts, probably because it has generally been assumed that it is absolute. It might be argued, however, that it is only *exclusion* from the class, and not the right to *pursue one's own suit* independently, that is guaranteed by the Rule.

The right merely to exclude oneself from a class action carries some significant benefits. An opting-out member is not bound by the class judgment and, once the class action is resolved, can continue his own suit. There are, however, some practical limitations on the value of exclusion without a right to sue separately. If an opt-out is prohibited from filing his own suit until the class action is resolved, the Statute of Limitations may have run by that time. And even if he had already filed suit and it is merely held in abeyance, the judgment in the class action may, as a practical matter, affect his ability effectively to proceed with his case. Thus exclusion alone offers benefits, but the right to conduct independent concurrent litigation obviously enhances those benefits.

A committee of the ABA Section on Litigation, in a 1986 proposal for "class action improvements,"<sup>247</sup> has recommended amending Rule 23(c)(2) to limit the right of (b)(3) class members to sue separately. It contends that

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245. See *supra* text accompanying notes 180-84.

246. FED. R. CIV. P. 23(c)(2).

247. American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986).

"the obligatory exclusion provision of subdivision (c)(2) can create unnecessary difficulties in the administration of a class action" and is "wasteful of scarce judicial resources and affords unnecessary opportunities for abuse."<sup>248</sup> It is one thing, it says,

for a class member to decide to have nothing to do with pending litigation. It is quite another for that member to insist upon exclusion under subdivision (c)(2) of the rule in order to institute a separate action where reliance will be placed upon the class action judgment to establish important aspects of the claim.<sup>249</sup>

Thus it proposes that the order permitting exclusion "may contain such conditions as are just," including a prohibition against instituting or maintaining a separate action on some or all the matters in controversy or against using in a separate action any judgment rendered in favor of the class.<sup>250</sup>

The ABA proposal foresees the use of a hybrid form of opt-out in a "mixed" class action that seeks both injunctive relief and individual damages. Class members would only be allowed to exclude themselves at a later stage in the proceeding when individual relief is determined.<sup>251</sup> Presumably other hybrid forms might also be allowed, such as Judge Heaney's and Judge Kelly's proposal of a partial opt-out right for settlement of punitive damages or an ADR opt-out option. By making opt-out rights in all three types of class actions subject to a judge's tailoring of "exclusion provisions appropriate to the needs of the particular case," the ABA proposal contemplates a much more flexible approach to duplicative litigation problems.

Hybrid opt-out rights have certain affinities to the kinds of prudential trial limitations that federal judges sometimes place on opt-out parties in the interests of avoiding unnecessary duplication and conflicting judgments. For example, the cases of opt-out class members may be tried concurrently with the class action claims.<sup>252</sup> Just as attorneys in consolidated cases can be denied the right to individual participation through selection of lead

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248. *Id.* at 206-07 (Committee Commentary on Rule 23(c)) ("[M]atters pertinent to this determination will ordinarily include: (A) the nature of the controversy and the relief sought; (B) the amount or nature of any individual member's injury or liability; (C) the interest of the party opposing the class in securing a final resolution of the matters in controversy; and (D) the inefficiency or impracticability of separately maintained actions to resolve the controversy." *Id.* at 202, Rule 23(c)(2)).

249. *Id.* at 206 (Committee Commentary on Rule 23(c)).

250. *Id.* at 202 (Rule 23(c)(2)).

251. *Id.* at 207 (Committee Commentary on Rule 23(c)).

252. *See In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 785 (E.D.N.Y. 1980) (opt-outs' suits could be "consolidated for joint trial with the class action"); *In re Plywood Antitrust Litig.*, 376 F. Supp. 1405 (Jud. Pan. Multi. Dist. Litig. 1974), 76 F.R.D. 570 (E.D. La. 1976) (class certified), 655 F.2d 627 (5th Cir. 1981) (pretrial order for concurrent trials (Oct. 1978)); *see also* W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 183-84 (1982) ("[i]ndividual actions ancillary to the class action should be managed so as to minimize duplication of activity," including consolidation); *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 334 (5th Cir. 1982) (trial court free to consider consolidation of class action with suit by intervening class members).

counsel,<sup>253</sup> the degree of opt-out participation in a concurrent trial would seem to fall within the trial court's discretion. And opt-outs would have no better objection to being required to participate in a concurrent trial than do parties in consolidated cases. The concurrent trial is best suited to a federal question case where all duplicative cases are in federal courts and where existing cases and opt-outs are subject to transfer and consolidation. But even where there are duplicative state suits, it would permit the harshness of an absolute injunction against prosecution of state suits to be tempered with the right to opt-out status in a concurrent federal trial.<sup>254</sup>

Even if certain limitations on opt-out rights are permissible under the present rules or if Rule 23(c)(2) were amended to allow broad hybrid forms of opt out, there is a possible constitutional problem with restricting (b)(3) opt-out rights in order to avoid duplicative litigation. *Phillips Petroleum Co. v. Shutts* held that in order for plaintiff class members to be bound by a class judgment, they must receive notice, an opportunity to be heard and participate in the litigation, and a right to opt out.<sup>255</sup> This language was used, however, in the context of a court's finding that a forum state may exercise jurisdiction over the claims of absent class-action plaintiffs even though they lack minimum contacts with the forum that would support personal jurisdiction over a defendant. One interpretation of *Shutts* is that an opt-out right is only required if the plaintiff class members do not possess minimum contacts with the forum.<sup>256</sup> Many (b)(3) class actions would thus

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253. See MANUAL FOR COMPLEX LITIGATION—SECOND § 20.22 (West ed. 1986).

254. In addition to administrative and procedural limitations on opt-outs, a variety of incentives could also be used to foster unitary disposition of cases. The A.L.I. Preliminary Study of Complex Litigation discusses modifications in preclusion rules to deny the benefits of offensive collateral estoppel to opt-outs and to allow defensive use of collateral estoppel against opt-outs from a class that ultimately loses. See also *Premier Elec. Constr. Co. v. National Elec. Contractors Assoc., Inc.*, 55 U.S.L.W. 2499 (7th Cir. Mar. 2, 1987) (opt-outs may not rely on decisions favorable to class to collaterally estop defendant in separate suit). It also raises the possibility of denying opt-outs the benefit of the tolling of the statute of limitations for their claims as of the date of the consolidated action's filing. American Law Institute, Preliminary Study of Complex Litigation 118-22, (Report, Mar. 31, 1987). These approaches, however, involve changes in substantive law and, because they may result in loss of significant benefits, they raise constitutional questions as do outright denials of the right to opt out.

255. *Shutts*, 105 S. Ct. 2965. *Shutts* did not pass upon whether such rights apply to counterclaims against class members, *id.* at 2974 n.2, or to suits for equitable relief not wholly or predominately for money judgments, *id.* at 2975 n.3.

256. See *Miller & Crump*, *supra* note 166. "If all class members have an affiliation with the forum, the court can compel appearance, and the inference of consent is unnecessary. Notice and an opportunity to be heard probably still would be required as independent due process guarantees, but the right to opt out presumably could be denied . . ." *Id.* at 30. *Miller and Crump* conclude:

One way to view *Shutts* is as a case about distant forum abuse. The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum. If this reasoning is accepted, *Shutts* does not abolish all mandatory classes. Instead, it prohibits only those mandatory actions that are brought in inappropriate forums.

*Id.* at 52.

be exempt from a constitutional opt-out requirement because the class members have minimum contacts with the forum, for example, the *Skywalk* case where each of the plaintiffs' claims rested on physical presence and injuries in the Kansas City hotel<sup>257</sup> or districtwide or statewide class actions in toxic tort cases.<sup>258</sup>

Where all plaintiff class members do not have minimum contacts, as in certain nationwide consumer or exposure toxic tort cases, *Shutts* would pose serious problems for leaving (b)(3) class opt-out rights to a judge's determination. But the ABA proposal did not simply leave it to the judge's discretion. It set out four factors, requiring an assessment of the nature of the controversy and relief sought, the amount or nature of individual members' injury or liability, the interests of the opposing party in securing a final resolution, and the inefficiency or impracticality of separate actions.<sup>259</sup> Under these criteria, one can imagine that many (b)(3) class actions would not be found appropriate for limiting opt-out rights because there is no compelling need to avoid inconsistent standards or depletion of a fund. Some (b)(3) classes, however, would satisfy these criteria, and thus the question of the constitutionality of limiting opt-out rights remains.

Most analyses of *Shutts* suggest that it leaves room for restricting opt-out rights where a proper balancing of interests is made. For example, in assessing its impact on the propriety of mandatory class actions which deny opt-out rights, Professors Arthur Miller and David Crump suggested the consideration of four policy factors to be weighed "in the context of each action": (1) efficiency concerns, (2) equity concerns, (3) the concern about distant forum abuse, and (4) the interest in individualized control.<sup>260</sup> They concluded that *Skywalk* and *Agent Orange* presented sound claims for mandatory certification, *Skywalk* because of efficiency and equity considerations and the absence of forum abuse, and *Agent Orange* because of efficiency and equity factors that overcame the distant forum factor and the individual interest in control because of the size and complexity of the litigation.<sup>261</sup> In *Dalkon Shield*, however, they found distant forum abuse and interest in individual control outweighed weak efficiency and equity factors.<sup>262</sup>

This analysis, of course, deals with mandatory class actions in which there is a much greater need for restricting opt-out rights. In a footnote, the *Shutts* opinion specifically limited its holding to claims predominately for money damages, thus recognizing the different historical and policy justi-

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257. See *Skywalk*, 680 F.2d at 1177.

258. See *Jenkins*, 109 F.R.D. 269, *aff'd*, 782 F.2d 468 (5th Cir. 1986) (certifying a (b)(3) class of 893 asbestos personal injury claimants with suits pending in the Eastern District of Texas).

259. See *supra* note 248.

260. Miller & Crump, *supra* note 166, at 52-57.

261. *Id.* at 56.

262. *Id.*

fications for (b)(1) and (2) mandatory classes.<sup>263</sup> It would take some stretching to justify the ABA proposal to restrict (b)(3) opt-out rights in a similar fashion. But hybrid opt-out rights blur the distinctions between the classes and logically suggest a functional analysis in each case as to the degree of mandatoriness needed and the level of sufferance of duplicative litigation to be allowed. The constitutional question is far from certain, but it would appear that limitation on opt-out rights even in a (b)(3) class could, under appropriate conditions, pass constitutional muster.

### CONCLUSION

A federal class action offers unique abilities to resolve certain kinds of disputes effectively and economically in a unitary action. More efficient use of the class action could be fostered by amendments to Rule 23 and legislation.<sup>264</sup> But there is room, within the present legal structure, for making the federal class action a more effective vehicle for unitary resolution of disputes. In order for it to achieve its objectives, it may be necessary to limit the opt-out rights of class members or to enjoin duplicative litigation in other courts. Mandatory (b)(1) and (2) classes display peculiar needs to prevent duplicative litigation. However, rigid applications of the Anti-Injunction Act that prevent enjoining duplicative litigation in state courts have failed to accord adequate respect to the efficiency and fairness policies underlying the federal class action. The Act's federalism concerns can be properly satisfied by a functional approach without ignoring the benefits of unitary resolution. Hybrid opt-out rights offer a means of tailoring the use of federal power to enjoin duplicative litigation to the special conditions present at a particular time in the course of a class action. By judicious balancing of the devices available for avoiding the deleterious effects of duplicative litigation, federal courts can provide a unitary resolution of appropriate disputes without undue interference with the interests of parties or other forums.

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263. *Shutts*, 105 S. Ct. at 2975 n.3.

264. *See supra* note 237.

